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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 565

THE OKANOGAN, METHOW, SAN POELIS (OR SAN POIL), NESPELEM, COLVILLE, AND LAKE INDIAN TRIBES OR BANDS OF THE STATE OF WASHINGTON, PETITIONERS,

vs.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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[fol. 1]

SUPREME COURT OF THE UNITED STATES

October Term, 1928

No. 565

The Okanogan, Methow, San Poils (or San Poil), Nespelem, Colville, and Lake Indian Tribes or Bands of the State of Washington, Petitioners,

vs.

The United States, Respondent

Petition for Writ of Certiorari to the Court of Claims

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

These petitioners, by their counsel, pray that a writ of certiorari may issue to review the judgment of the Court of Claims herein, entered April 16, 1928, which sustained defendant's demurrer and dismissed the petition, on the ground that the bill under which it was filed never became a law. A motion for rehearing was denied October 22, 1928.

Statement of the Case

Senate Bill No. 3185, 69th Congress, First Session, entitled "An Act authorizing certain Indian tribes and bands, or any of them, residing in the State of Washington, to present their claims to the Court of Claims," having been duly passed by both houses of Congress and having been duly signed and attested by the presiding officers thereof, [fol. 2] was duly presented to the President for his consideration on June 24, 1926. On July 3, 1926 (eight days thereafter, Sundays excepted) the First Session of the 69th Congress adjourned for the summer recess. The President did not sign said bill, or file it with the Secretary of State without his signature, or return it with his objections to the House in which it originated within ten days (Sundays excepted) after it was so presented to him, or at all.

Petitioners claim that the bill became a law because of the President's failure to return the bill to the Senate with his objections within ten days (Sundays excepted) after it was presented to him, as provided by Article 1, Section VII, Clause 2, of the Constitution of the United States, because he was not prevented from so returning the bill by the adjournment of the First Session of the 69th Congress, as this Congress did not terminate until March 4, 1927, and the 69th Congress continued as an existing legislative body and the officers of the two Houses thereof continued to perform their duties until said date.

Question Presented

The sole question here involved is whether by the adjournment of the First Session of the 69th Congress the President was prevented from returning the bill with his objections to the House in which it originated, under that part of Article 1, Section VII, Clause 2, of the Constitution of the United States, providing, "If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law," so that said bill thereby failed to become a law.

Reasons for Granting this Petition

1. The question here involved is of great public interest [fol. 3] and far-reaching importance.

2. This Court has not heretofore construed the words "by their adjournment prevent its return," in Article 1, Section VII, Clause 2 of the Constitution of the United States, and it is, therefore, still an open question before this Court as to whether the word "adjournment" therein refers to a final adjournment of the Congress; the adjournment of a session of the Congress, or to the adjournment of the Congress from day to day, or for longer periods, during a session.

3. This Court has not heretofore construed the words "by their adjournment prevent its return," in Article 1,

Section VII, Clause 2 of the Constitution of the United States, and it is still, therefore, an open question before this Court as to whether the sine die "adjournment" of "the Congress," or the adjournment of a session or sitting thereof, or from day to day, or for a longer period of time during a session, "prevents" the return of a bill with the President's objections to the Congress under the quoted language of the Constitution.

4. This Court has not heretofore construed the words "10 days" as used in said quoted clause and it is still, therefore, an open question whether the "10 days" under contemplation are 10 consecutive legislative days (Sundays excepted); therefore, this Court has not determined whether the return must be made within 10 calendar days and during a recess of the active legislative settings of the Congress, or may be made within 10 legislative days and when the Congress has again resumed its active legislative sittings upon the adjournment.

5. It would appear to be the constitutional duty of the President to afford Congress an opportunity to consider his objections to all bills passed by it, if possible for him to do so, before the final adjournment of any particular Congress, for the reason that Article 1, Section 1 of the Constitution has vested Congress with the exclusive power [fol. 4] of legislation, and the President did not give Congress an opportunity to consider his objections to the legislation here in question, although this Congress did not terminate until March 4, 1927, and was in legislative session for several months prior thereto, and the officers of both Houses thereof continued to perform their duties until said date, notwithstanding that the first legislative session of the Congress ended on July 3, 1926 by adjournment for summer recess.

6. The action of the President in the case at bar appears to be in conflict with the exercise by Congress, and to deprive Congress of its exclusive right to legislate under Article 1, Section 1 of the Constitution, as his action, if valid, amounts to an absolute veto by him of the legislation here in question, while this Congress was still in actual existence as a legislative body; and deprives the Congress

of its constitutional right to repass the identical legislation by a two-thirds vote and thus make it a law notwithstanding the executive objections.

7. Because the question here involved necessitates the final determination of the line of demarkation between the Executive and Legislative Branches of the government, as to the extent of the right of the Executive to negative any legislation, and the right of the Congress to reconsider legislation objected to by the Executive, it is believed that the case at bar should be determined by this Court as the Court of last resort.

8. In view of the fact that Judiciary Committees of both Senate and House have at different times disagreed with the construction given to this part of Article 1, Section VII, Clause 2, by some of the Presidents and their legal advisors, and that the highest courts of several of the States have construed identical or similar language in their State constitutions directly contrary to the construction sought [fol. 5] to be reviewed, it is considered of the utmost importance that this provision should be construed by this Honorable Court.

9. Because of the far-reaching importance of any judicial construction of the Constitution, it is believed that every question involving such construction should be finally determined by this Honorable Court as a court of final resort thereon.

Wherefore it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Claims should be granted.

The Okanogan, Methow, San Poeil (or San Poil), Nespelem, Colville, and Lake Indian Tribes or Bands of the State of Washington. William S. Lewis, by William S. Lewis, Counsel. A. R. Serven, John G. Carter, of Counsel.

IN THE

Court of Claims of the United States

THE OKANOGAN, METHOW, SAN POEILS (OR SAN POIL), NESPELEM, COLVILLE AND LAKE INDIAN TRIBES OR BANDS OF THE STATE OF WASHINGTON,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

No. H-121

PETITION

(Filed March 28, 1927.)

To the Honorable, the Chief Justice and Associate Justices of the Court of Claims of the United States:

Your petitioners, the Okanogan, Methow, San Poeils (or San Poil), Nespelem, Colville and Lake Indian tribes or bands of the State of Washington, and the individual members thereof, (now commonly known as the Okanogan and Colville tribes of Indians), respectfully represent to the Court:

I

1. The petitioners are all members of what were and are known as the Okanogan, Methow, San Poeils

(or San Poil), Nespelem, Colville and Lake Indian tribes or bands of the State of Washington, and that they reside in the said State of Washington, principally on or near the Colville Indian Reservation in said State. And that these petitioners are the same and identical several tribes or bands of Indians referred to and particularly mentioned in the hereinafter mentioned Act of Congress of the United States, and for whose special benefit and relief said law was enacted and are the component parts of what are now commonly known as the Okanogan and Colville tribes of Indians. That the petitioners have employed William S. Lewis, of the bar of this Court, as their attorney to prosecute their claims under a contract, executed in their behalf by a committee selected by the petitioners in accordance with existing law, and approved as provided by existing law.

The petitioners are the owners and all the parties interested in the claims herein sued upon, and that no assignment or transfer of said claims, or any part thereof, or of any interest therein, has been made by them or any of them; that the petitioners have not commenced, nor have they, or any of them, now pending any suit, or suits, on account of the claims herein set forth, against the defendant, or any of the defendant's agents, in any other court; that the petitioners believe they are justly entitled to recover the amount of the claims here sued upon, after deducting therefrom all just offsets and counter claims to which the defendant may be found to be entitled: that these petitioners have not voluntarily aided, abetted, or given encouragement to rebellion against the defendant: and have at all times shown allegiance to the defendant, United States; and that the petitioners believe the facts stated in this petition are true.

2. Petitioners bring this suit by virtue of, and under authority granted by, an Act of Congress of the United

States of America, towit: Senate Bill No. 3185, 69th Congress, 1st Session, entitled "An Act authorizing certain Indian tribes and bands, or any of them, residing in the State of Washington, to present their claims to the Court of Claims": which said Act having been duly passed by both Houses of the Congress of the United States on June 23, 1926, and having been duly signed by the presiding officers thereof, and been duly attested as by law required, was thereafter on June 24, 1926, duly presented to the President of the United States, and the said bill not being returned by the President within 10 days after it was so presented to him, or at all, the same became, and now is a law in like manner as if he had signed it; the said 69th Congress of the United States not having by adjournment prevented its return. (Article 1, Sec. 7, clause 2, Constitution of the United States.)

3. The said Act of Congress and the Sections thereof upon which the petitioners rely read as follows towit:

> *Be it enacted by the Senate and House of representatives of the United States of America in Congress assembled,* that jurisdiction is hereby conferred on the Court of Claims, with the right to appeal to the Supreme Court of the United States by either party, as in other cases, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims of the Okanogan, Methow, San Poells (or San Poil), Nespelem, Colville, and Lake Indian tribes or bands of the State of Washington, or any of said tribes or bands, against the United States arising under or growing out of the original Indian title, claim, or rights of the said Indian tribes and bands, or any of said tribes or bands (with whom no treaty has been made), in, to, or upon the whole or any part of the lands and their appurtenances in the State of Washington embraced within the follow-

ing general descriptions, to wit: Commencing at the intersection of the west bank of the Okanogan River with the international boundary line between the Province of British Columbia, Canada, and the State of Washington, thence west along said line to its intersection with the summit of the main ridge of the Cascade Mountains; thence in a southerly direction along the summit of said main ridge of the Cascade Mountains to a point where the northern tributaries of Lake Chelan and the southern tributaries of the Methow River have their rise; thence southeasterly on the divide between the waters of Lake Chelan and the Methow River to the Columbia River; thence, crossing the Columbia River in a true line course east, to a point whose longitude is one hundred and nineteen degrees and ten minutes; thence in a true south course to the Government survey township line between townships 24 and 25 north; thence east along said township line to Hawk Creek, in Lincoln County, Washington; thence down said Hawk Creek to its intersection with the Columbia River; thence westwardly along the south bank of the Columbia River to a point opposite the mouth of the Okanogan River; thence north across the Columbia River and up the west bank of the Okanogan River to the place of beginning; also, commencing on the north bank of the Spokane River at its junction with the Columbia River, thence in a northeasterly direction along the summit of the ridge separating the drainage basin of the Spokane River from that of the Columbia River and its tributary, the Colville River, to the main ridge of the Calispell Mountains; thence in a northerly direction along the summit of the main ridge of said Calispell Mountains, extended, to the international boundary line between said Province of British Columbia, Canada, and the State of Washington; thence west along said line to the east bank of the Columbia River; thence in a general southerly direction along said east bank of the Columbia River to the said mouth of the Spokane River; also, commenc-

ing at a point on the west bank of the Columbia River opposite the mouth of the Spokane River; thence in a general northerly direction to and along the summit of the main ridge dividing the waters of the San Poil River from those of the Columbia and Kettle Rivers, and along the summit of said ridge extended northerly to the said international boundary line between the Province of British Columbia and the State of Washington; thence west along said international boundary line to the summit of the main ridge separating the waters of the Okanogan River from those of the upper Kettle River; thence in a general southerly direction to and along the summit of the divide between the waters of said Okanogan River and those of Nespelem Creek to the north bank of the Columbia River; thence in a general easterly direction along the north bank of the Columbia River to a point opposite the mouth of the Spokane River, the place of beginning; which said lands or rights therein or thereto are claimed to have been taken away from said Indian tribes and bands, or some of them, by the United States, recovery therefor in no event to exceed $1.25 per acre; together with all other claims of said tribes or bands of Indians, or any of said tribes or bands, arising under or growing out of fishing rights and privileges held and enjoyed by said tribes and bands, or any of them, in the waters of the Columbia River and its tributaries; or arising or growing out of hunting rights and privileges held and enjoyed by said tribes and bands, or any of them, in common with other Indians in the "common hunting grounds" east of the Rocky Mountains as reserved by and described in the treaty with Blackfoot Indians, October 17, 1855 (Eleventh Statutes at Large, pages 657 to 662), and which are claimed to have been taken away from said tribes and bands, or any of them, by the United States without any treaty or agreement with such Indian claimants therefor and without compensation to them.

Sec. 2. Any and all claims against the United

States within the purview of this Act shall be forever barred unless suit or suits be instituted or petition, subject to amendment, be filed as herein provided in the Court of Claims within five years from the date of the approval of this Act, and such suit or suits shall make the said Okanogan, Methow, San Poells (or San Poil), Nespelem, Colville, and Lake Indian tribes or bands of Washington, or any of said tribes or bands, party or parties, plaintiff, and the United States party defendant. The petition shall be verified by the attorney or attorneys employed to prosecute such claim or claims under contract with the Indians approved in accordance with existing law; and said contract shall be executed in their behalf by a committee or committees selected by said Indians as provided by existing law. Official letters, papers, documents and records, maps, or certified copies thereof may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said Indians to such treaties, papers, maps, correspondence, or reports as they may require in the prosecution of any suit or suits instituted under this Act.

Sec. 3. In said suit or suits the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against the said Indian tribes and bands, or any of them, but any payment or payments which have been made by the United States upon any such claim or claims shall not operate as an estoppel, but may be pleaded as an offset in such suit or suits, as may gratuities, if any, paid to or expended for said Indian tribes and bands, or any of them.

Sec. 4. Any other tribes or bands of Indians the court may deem necessary to a final determination of any suit or suits brought hereunder may be joined therein as the court may order: *Provided*, that upon final determination of such suit or suits the Court of Claims shall have jurisdiction to fix and determine a reasonable fee, not to exceed 10 per centum of the recovery, by any one of the said tribes or bands,

and in no event to exceed the sum of $25.000 for any one of said tribes or bands of Indians, together with all necessary and proper expenses incurred in the preparation and prosecution of such suit or suits to be paid to the attorney or attorneys employed as herein provided by the said tribes or bands of Indians, or any of said tribes or bands, and the same shall be included in the decree, and shall be paid out of any sum or sums adjudged to be due said tribes or bands, or any of them, and the balance of such sum or sums shall be placed in the Treasury of the United States, where is shall draw interest at the rate of 4 per centum per annum.

4. That the petitioners have, from time immemorial and since the first records by white men, lived adjacent to each other; that the Okanogan Indian tribe was and is composed of several closely related bands and families, one of which occupying the southwestern portion of the tribal territory has sometimes been referred to as and called the Methow band from the stream of that name flowing through their country; that the San Poeil (or San Poil) Indian tribe, whose name has been variously recorded and spelled, was and is also composed of related bands and families, one of which occupying the southern and southwestern portion of the tribal territory has sometimes been referred to as and called the Nespelem band, from the stream of that name flowing through their country; that the Colville Indian tribe was originally known as the Shwoyelpi, or Kettle Falls Indian tribe, and later as the "Colville" Indian tribe from the fact that the Hudson's Bay trading post, Fort Colville, was long located in their lands; that the said Colville Indian tribe was and is also composed of related bands and families, one of which occupying the tribal territory along the Columbia and Kettle rivers northward from Kettle Falls has sometimes been referred to and called the Lake Indian tribe or band.

That, as hereinafter stated, certain foreign bands of Indians, i. e. the Moses band of the Yakima Indian tribe, and the Joseph Band of the Nez Perce Indian tribe have been imposed upon and placed among the petitioners and are sometimes improperly referred to as "Colville" Indians. That said last mentioned bands of Indians are not a part of the Colville Indian tribe or of any of the petitioning bands in this action, and that neither of said Moses and Joseph bands of Indians have any interest in the claims here presented, and that the said Joseph band is now prosecuting its own claims against the defendant in action No. E-427 of the files of this Court.

The petitioners, from time immemorial and long prior to the advent of the first white explorers and fur traders into what is now known as the eastern part of the State of Washington, with the assent and acknowledgement of all other Indians having any knowledge of them and their country, had in severalty as their habitat and range and had, possessed, claimed and used as their own for fields, grazing, berry, root, fishing and hunting grounds in addition to a common participation in and use of the "common hunting ground" east of the Rocky Mountains, hereafter set forth, and without dispute by others, the region of country in the northeastern part of the present State of Washington situated and generally described as follows:

> Bounded on the North by the international boundary line between the United States and Canada at the 49th parallel of latitude; on the West and Southwest by the summit of the Cascade Mountains and the lands of the Dwamish, Suquamish and allied Indian tribes as defined by the Point Elliott Treaty of January 22, 1855 (12 Stats. 927), and the lands of the said Yakima Indian nation as defined by the Camp Stevens or Walla Walla Treaty of June 9, 1855 (12 Stats. 951); on the South by the lands of the said Yakima

Indian nation, as above defined, and the lands of the Spokane Indian tribe; and on the East by the Summit of the Calispel Mountains and the lands of the said Kalispel, or Lower Pend O'Reille Indians, as they are sometimes designated.

Attached hereto, marked Exhibit "A", and made a part hereof, is a map showing the location of the said lands so owned by the petitioners.

5. That prior to June 15, 1846 the said lands so occupied and possessed by petitioners immediately south of the 49th parallel of latitude were a subject of joint occupancy and conflicting claims between defendant and Great Britain; and that when the treaty of Washington was concluded between the defendant and her majesty, the queen of the United Kingdom of Great Britain and Ireland, on said June 15, 1846, and the defendant acquired exclusive and recognized sovereignty over the region south of said 49th parallel of latitude and the recognized fee to lands theretofore in dispute south of said international boundary line, these petitioners were then in recognized, exclusive and undisputed posession of all the lands, rights and privileges herein set forth, and the defendant's fee was, as to the actual possession of the said lands and the enjoyment of the soil and its appurtenances, charged with the existing, and continued possession, and the exclusive possessory rights to the enjoyment and use of the soil and its appurtenances, within said limits, vested in and held by these petitioners.

6. That by established precedent existing at the time of the treaty of Washington, June 15, 1846, and ever since, the defendant, United States, had, with respect to its dealings with and the rights of Indian tribes in the original occupancy of lands in this country, adopted and announced the policy and established the law:

> That such Indians had title and right to the perpetual occupancy of the lands occupied by them, with the privilege of using it in such manner as they saw fit until such right of occupancy had been surrendered to the government (*Spaulding v. Chandler*, 160 U. S. Sup. Ct. 384; 402, 403) and that such original possessory title and right to lands occupied by Indian tribes would be extinguished only with the consent of the tribes recognized as having claim to the soil by reason of their occupancy thereof (*Leavenworth L. & G. R. R. vs. U. S.*, 92 U. S. 733).
>
> Act of June 30, 1834, (4 Stats. 730).

That in the Organic Acts creating the Territories of Washington and Montana (10 Stats. 172; 13 Stats. 85) the rights, titles and interests of petitioners and of all Indians within said territories were recognized and preserved by the following provisions:

> Nothing in this title shall be construed to impair the rights of person or property pertaining to the Indians in any territory, so long as such rights remain unextinguished by treaty between the United States and such Indians, nor to include any Territory which by treaty with any Indian tribe, is not without the consent of such tribe, embraced within the territorial limits of any State or Territory; but all such territory shall be excepted out of the boundaries, and constitute no part of any Territory now or hereafter organized, until such tribe signifies its assent to the President to be embraced within a particular Territory.

That the rights, title and interests of the petitioners, and of other Indians within said Territories were further recognized and preserved in the Organic Act (approved February 22, 1889) creating and admitting said States of Washington and Montana, by the provision therein that the people of said states disclaim all rights:

> To all lands lying within said limits owned or held by any Indian or Indian tribes; and that

until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and controll of the Congress of the United States.

7. That following ratification of treaty of Washington and the creation of Washington Territory and the extension of defendant's civil government over the said region so occupied by the petitioners these petitioners became and ever since have been and now are wards of the defendant, and under the guardianship and control of the defendant, United States. That the whole of the lands, hereinbefore described in paragraph 4 hereof, and then occupied by and in the exclusive possession of petitioners comprise approximately 7,729,040 acres; the exact survey extent of which is unknown to petitioners. That the nature and extent of petitioners' original, then existing and unextinguished fishing and hunting rights, hereafter more particularly set forth, and the nature and extent of petitioners' original, then existing and unextinguished title, possession, occupancy and use of all of the lands, described in paragraph 4 hereof, and their appurtenances, has been known to the defendant, and its Indian agents,Indian Commissioners and Indian Superintendents since the first advent of Governor Isaac I. Stevens into said region in 1853; said Stevens then holding and acting under commission from defendant as its Commissioner and Superintendent of Indian Affairs for said region.

8. That the defendant, and its said Commissioner and Superintendent of Indian Affairs, Isaac I. Stevens, in 1853 recognized and acknowledged the said original Indian possessory right and title of the petitioners, and of other Indian tribes occupying other lands, to practically all the lands within said Washington Territory, and that the defendant specially commission-

ed and instructed its said Commissioner and Superintendent of Indian Affairs, Isaac I. Stevens, to negotiate treaties with the said various Indian tribes within said Territory of Washington, for the voluntary relinquishment and cession by said Indian tribes of their possessory right, title and claims in and to a substantial part of the lands so occupied and possessed by them.

That pursuant to such instructions from defendant said Isaac I. Stevens, as Commissioner and Superintendent of Indian Affairs, did in the year 1855 negotiate and conclude treaties with most of the Indian tribes, other than petitioners, occupying and possessing lands within the boundaries, of said Washington Territory.

9. That in the treaties then so negotiated with the Yakima Indian Nation, and with the Dwamish and allied tribes the western and southwestern boundaries of the land owned, occupied and held by petitioners were recognized, and established by defendant and its said Commissioner and Superintendent of Indian Affairs, Isaac I. Stevens, and said contracting Indian parties, and that the full extent of the lands so occupied and possessed by petitioners was recognized, noted and set out by said Stevens in his maps and reports to defendant made in connection with the treaties then so negotiated.

That is was the announced purpose and intention of defendant and of said Isaac I. Stevens as Superintendent and Commissioner of Indian Affairs to likewise negotiate and conclude treaties with these petitioners, and other Indian tribes, occupying lands to the east and south of the lands occupied by the petitioners, for the relinquishment of their original, existing, recognized, and unextinguished rights and title in, to and upon a portion of the lands then in their acknowledged possession.

That a large quantity of Indian treaty supplies, gratuities and presents for such purpose were transported by said Isaac I. Stevens to Antoine Plante's place in the Spokane Valley, Washington Territory, (near the site of the present City of Spokane) for use at such proposed council, and that a council between the defendant's said Commissioner and Superintendent of Indian Affairs, Isaac I. Stevens, and the petitioners and other neighboring non-treaty Indians was planned and called for December 4, 1855, at said place.

10. That the petitioners attended said council at said Antoine Plante's place on December 4, 1855; that at said council the said rights, title and claims of the petitioners in, to and upon the said lands occupied and possessed by them and over which they roamed and hunted was recognized and conceded by said Isaac I. Stevens as Commissioner and Superintendent of Indian Affairs for defendant, and that said Stevens, as representing defendant then stated to the representatives of petitioners present in said council with respect to their said lands and rights:

> "Your rights are your rights and you shall not be deprived of them.....I, your friend say that your lands will not be taken from you..... It is my business as your friend to protect you in your lands and rights....."

That the prior outbreak of the Yakima Indian war, then in progress, and requiring Governor Stevens' immediate attention and personal presence elsewhere and the general unrest occasioned thereby, prevented a continuance of the council and the conclusion of a treaty and that the council adjourned with expressions of mutual friendship to be reconvened after the close of the Indian war. That petitioners and the other assembled Indians then furnished their own horses and arms to Governor Stevens and his ill equipped party for their journey through the hostile Indian country.

11. That various causes following in succession: the said Indian wars of 1855-1858 and the resulting disturbances and unrest; the gold mining excitements of 1855-1865; the delay in securing approval and ratification of other treaties already negotiated; the outbreak of the Civil War, etc., postponed and defeated the defendant's expressed intention to negotiate and conclude a treaty with the petitioners for the cession and relinquishment of their recognized and unextinguished possessory rights and title in, to and upon a part of the said lands occupied and possessed by them.

That at all times since 1855 the defendant, and especially its Indian Agents and Commissioners in charge of the Indian Affairs have had full knowledge of the character and extent of the said outstanding and unextinguished rights and title of these petitioners in, to and upon said lands and of the petitioners' fishing, and hunting rights and privileges. That defendant's Indian agents charged with the conduct of petitioner's affairs have repeatedly reported said matter to the Commissioner of Indian Affairs. That on several occasions the matter of mutual treaty or agreement with respect to said subject has been discussed between petitioners and representatives of defendant. That in 1873 a settlement was discussed between petitioners and defendant, but that the same failed to secure approval of Congress and that defendant is now and for years past has been wholly unable to perform the conditions then proposed by reason of defendant's own acts in granting patents and conveying to the Territory and State of Washington, and to various private persons and corporations the fee of the lands reserved and to be confirmed in petitioners by the terms of said council negotiations, and that the proposals became void and are of no binding force or effect on either party to this action.

That no other treaty or agreement has ever been

negotiated or concluded between the petitioners and defendant with respect to the rights and claims here sued on, and that petitioners said rights and title to said lands and appurtenances, with respect to which the claims are here presented, are yet unextinguished and outstanding. That up to the year 1884, or even later, defendant's Indian Agents were still reporting said fact to the Commissioner of Indian Affairs and calling attention of defendant's said Commissioner to said outstanding and existing rights and claims of these petitioners, and urging the justice, propriety and necessity for extinguishing such rights in whole or part by securing petitioners' voluntary cession or relinquishment thereof.

12. That in all the years intervening since 1855, until very recently, the petitioners have been unused to white man's ways with respect to dealings with the defendant, United States, and petitioners being poor and ignorant had no one, other than the defendant's own agents, to represent and advise them, and that for years petitioners have relied in good faith upon the promises and assurances made to them by Isaac I. Stevens, and other agents of defendant, that the defendant would protect petitioners in their said rights and lands.

That contemporary with said statements and assurances by said Stevens and other agents of the defendant in charge of its Indian Affairs, and with out extinquishing the petitioners' said title and possessory rights in, to and upon said lands, described in paragraph 4, defendant and other officers and agents of defendant invited white settlers to intrude on petitioners' lands under the "donation", "preemption", "timber culture", "homestead", and similar Acts, and defendant and its agents proceeded to survey petitioners' lands as part of the public domain of the defendant; and defendant proceeded by Act of Con-

gress to grant portions thereof to the Northern Pacific Railroad Company, to the Territory of Washington, and others, and continued to deal with said lands in all respects the same as though they were a part of defendant's public domain.

That due to their geographical situation, petitioners' said lands were off the early routes of travel from the Eastern States and remote from any thickly settled region in said Washington Territory, and consequently the petitioners were not greatly disturbed in their said possession, use and rights in their said lands until about 1882, when the completion of the Northern Pacific Railroad brought a large influx of settlers into the Territory of Washington; many of whom began settling upon the lands of these petitioners and crowding petitioners from their homes.

13. That by Executive Order of April 8th, 1872, the defendant without knowledge of petitioners created out of a portion of the lands of the petitioners, Colville and Lake Indian tribes or bands, the first Colville Indian Reservation embracing much of the best land owned by said two Indian tribes or bands in the Chewelah, Colville and Columbia River valleys and including therein the lands whereon most of said Colville and Lake Indians then resided. The fact of the creation of said Executive Order reservation was fraudulently concealed from petitioners, at the time, by defendant's Indian Agent then in charge of petitioners, to permit white settlers to protest against said Order and secure a revocation thereof without petitioners' knowledge of said matters. That on July 2, 1872, without the knowledge or consent of the petitioners the said Executive Order of April 8, 1872 was rescinded and a new Executive Order issued on July 2, 1872, creating the second Colville Indian Reservation out of the lands of the petitioners, San Poil and Nespelem Indian tribes or bands, and out of a

portion of the lands of the petitioners, Colville, Lake, Okanogan and Methow Indian tribes or bands.

That the petitioners, for whose purported benefit said Executive Order reservation was so created on July 2, 1872, were already in possession of all the lands embraced within said Executive Order of July 2, 1872, under their original, recognized, undisturbed and unextinguished Indian possessory rights and title, and that petitioners already had and held a better right and title to all the lands within the limits of said reservation than could be conferred or granted to them by defendant by said Executive Order of July 2, 1872.

Attached hereto, marked Exhibit "B"" and made a part hereof is a map showing the location and extent of that part of petitioners' original habitat included within the limits of said Colville reservation as created by the Executive Order of July 2, 1872.

The petitioners state that the defendant's President, officers and representatives acting at the time of the creation of the first Colville Indian reservation by Order of April 8, 1872 and at the time of the vacation of said Order and the creation of the second Colville Indian reservation by Executive Order of July 2, 1872, acted under the erroneous impression that the original title to the lands embraced within said orders had been extinguished and that the said lands were lawfully subject to such disposition as a part of the "public domain" of the defendant, and that they acted in ignorance of the lawful rights of the petitioners in the premises.

That the lands of the petitioners, Lake, Colville, Okanogan and Methow tribes or bands of Indians, excluded from the said Colville Indian Reservation, so created by the said Executive Order, were the most valuable lands possessed by said petitioners and the lands whereon the majority of the said petition-

ers than resided, and which they used for their principal cultivated gardens, fields, hay grounds, root, berry and fishing grounds. That the portion of the lands of the said petitioners, Lake, Colville, Okanogan and Methow Indian tribes or bands included within said Executive Order reservation of July 2, 1872 and a considerable portion of the lands of the said San Poil and Nespelem Indian tribes or bands were of gravel and sandy soil or of a broken, rocky, barren and mountainous character, little suited for agriculture, and valuable chiefly for its rock, minerals, and timber, and theretofore used principally by said petitioners for hunting, fishing and berry grounds, and for range for petitioners' horses and cattle.

14. That the petitioners never recognized, acknowledged or accepted the said Colville Indian Reservation, so created by Executive Order of July 2, 1872, as a settlement of their said rights and claims to other and more valuable lands, right and privileges then owned, held and possessed by them without the boundaries of said reservation, and in and on which most of the petitioners then had their principal habitat and home. That after July 2, 1872 these petitioners continued to use and exercise all their said lands, rights and privileges in, to and upon their lands, both without and within the limits of said Colville Indian Reservation, the same as they had previous to the issuance and promulgation of said Executive Order.

That from time to time various Indian Agents appointed by defendant in charge of the petitioners made occasional efforts to pursuade and induce the petitioners to abandon their lands and rights without said reservation and their homes, gardens, fields, and their berry grounds, root grounds, hunting and fishing grounds off said Colville Indian Reservation, but that the petitioners continued at all times to protest against the attempted injustice towards them.

and persisted in asserting their claims to, and in the full exercise of all their said title, rights and privileges in their lands without said Reservation until finally forced and driven from their said lands and rights by the threats of defendant's Indian Agents in charge over petitioners; the active and implied coercion of military force displayed by defendant, garrisoned and quartered in and upon defendants' lands: and the intrusions, threats and violence of white settlers invited into and upon petitioners' lands and encouraged and protected by defendant in a violation of all of petitioners' rights, and privileges in, and to said lands without the limits of said Colville Indian Reservation.

15. That the petitioners were and are a peaceful people; that they were and are friendly towards the whites; that they have had slight intercourse with the white men and early fur traders from about 1810, and have never been at war with the defendant and that they resisted the steadily increasing encroachments of white settlers upon their lands and rights in a patient, persistent and peaceful manner, while they were dispossessed of their homes, and fenced and cultivated fields, and threatened and assaulted, and even killed in disputes with white settlers in a peaceful effort to maintain their said title, rights and claims. That the people of Washington Territory desired petitioners' said lands and seized every pretext and opportunity to secure them and to procure the assistance of territorial and federal officials in forcing and compelling petitioners to remove from their good lands off said reservation onto the barren lands of the Colville reservation.

That between the years 1884 and 1889 most of the petitioners, except the said San Poil and Nespelem Indian tribes or bands, whose principal habitat and range has always been within the limits of said

Colville Indian Reservation, were crowded, forced and driven from, and deprived of all their ancient habitat, range, rights and privileges off said Colville Indian Reservation, and having no other place whereon they were permitted to rear their lodge poles and live in peace with defendant, its agents, military forces, and white settlers, finally took up their residence in and upon their lands within said Colville Indian Reservation.

That the said petitioners have continued at all times to protest against the injustice being done them, and to assert their lawful claims against the defendant, and that their act in finally taking refuge within the limits of said Colville Indian Reservation was a matter of necessity, that there was no other place to which defendant would permit petitioners to go or to reside, and that petitioners' said act of necessity was not intended either as an abandonment of petitioner's claims to lands and rights they were so forced to leave without the limits of said Colville Indian Reservation; or as an acceptance of their lands within said Indian Reservation as a consideration, satisfaction or release of any of their rights and claims without the limits of said Indian Reservation.

16. That these petitioners, under authority of the jurisdiction Act under which these claims are here filed and presented, and for the purpose of avoiding the expense of a multiplicity of suits against the defendant founded on their several joint and separate tribal claims against the defendant, have and do join in this one petition and in the foregoing common recital of the origin and historical development of their said claims, and now make the following detail specifications and statements with respect to their several joint and separate tribal claims:

II

Separate claims of the Lake and Colville Indian tribes or bands.

17. That the particular portion of the said lands, described in paragraph 4 hereof, lying outside of and east of the limits of the said Colville Indian Reservation so created by Executive Order of July 2, 1872, and which lands the petitioners Lake and Colville Indian tribes or bands occupied, possessed and held in severalty as part of their original, exclusive, and recognized habitat and range, as hereinbefore alleged is more particularly described as bounded by, and included within the following limits:

> Commencing on the north bank of the Spokane River at its junction with the Columbia River; thence in a northeasterly direction along the summit of the ridge separating the drainage basin of the Spokane River from that of the Columbia River and its tributary, the Colville River, to the main ridge of the Calispell Mountains; thence in a northerly direction along the summit of the main ridge of said Calispell Mountains, extended, to the international boundary line between said Province of British Columbia, Canada, and the State ow Washington; thence west along said line to the east bank of the Columbia River; thence in a general southerly direction along said east bank of the Columbia River to the mouth of the Spokane River.

That the general location and extent of said above described lands is indicated as tract (1) on the map hereto attached, marked exhibit "C" and made a part hereof. That the said lands aggregate 1,238,144 acres, more or less; the exact survey extent thereof being unknown to petitioners, but now known to the defendant.

Petitioners further state that the defendant, United States, without any treaty, or agreement with said Colville and Lake tribes or bands of Indians, or

either of them, having exclusive possessory rights and title thereto as aforesaid; without any session or relinquishment or abandonment of said rights by said Indian tribes or bands, or either of them; without the consent of said tribes or bands, or either of them, and against the will and over the protests of both of said tribes or bands; and without any compensation to them, or either of them; and without any lawful warrant appropriated to its own use, all of the said lands and appurtenances, and wrongfully deprived said tribes and bands of Indians of all their right, title and interest therein and thereto.

That the value of said lands and of the rights, and title of said tribes or bands of Indians, therein and thereto is fairly appraised at $1.25 per acre and that the terms of the said jurisdictianal act under authority of which this claim is prosecuted limit the recovery of said tribes and bands and of all the petitioners herein to the sum of $1.25 per acre, for all of the lands for which compensation is sought under this petition.

III

Separate claims of the Nespelem, (or lower San Poil), and Methow (or lower Okanogan) Indian tribes or bands.

18. That the particular portion of the lands, described in paragraph 4 hereof, lying outside of and south of the limits of the said Colville Indian Reservation as created by Executive Order of July 2, 1872, which the petitioners, Nespelem, (or lower San Poil) Indian tribe or band, and the Methow, (or lower Okanogan) band or tribe of Indians occupied, possessed and held in severalty as part of their original, exclusive and recognized habitat and range as hereinbefore alleged, is more particularly described as bounded by and included within the following limits:

Commencing at a point on the East bank of

the Columbia river at the north line of the lands of the Yakima Indian Nation as designated, fixed and ceded by the treaty of June 9, 1855 (12 Stats. 957, 958); thence in a true line course east, to a point whose longitude is one hundred and nineteen degrees and ten minutes; thence in a true south course to the Government survey township line between townships 24 and 25 north; thence east along said township line to Hawk Creek, in Lincoln County, Washington; thence down said Hawk Creek to its intersection with the Columbia River; thence westerly along the south bank of the Columbia River to the place of beginning.

That the general location and extent of the above described lands is indicated as tract (2) on the map hereto attached, marked Exhibit "C" heretofore referred to and attached hereto. That the said lands aggregate 570,000 acres, more or less; the exact survey extent thereof being unknown to petitioners but known to the defendant.

Petitioners further state that the defendant, United States, without any treaty or agreement with the petitioners, or with either the said Nespelem, (or lower San Poil tribe) and Methow, (or lower Okanogan) tribe or band of Indians, or either of them having exclusive possessory rights and title thereto as aforesaid; without any session or relinquishment or abandonment of said rights by said Indian tribes or bands or either of them; without the consent of said tribes and bands or either of them; and against the will and over the protests of both said tribes and bands; and without any compensation to them or either of them; and without lawful warrant appropriated to its own use all of the said lands and appurtenances and wrongfully deprived said tribes and bands of Indians of all their right, title and interest therein and thereto.

That the value of said lands and of the rights and

title of said tribes or bands of Indians therein and thereto is fairly appraised at $1.25 per acre, and that the recovery against the defendant herein is by law limited to $1.25 per acre for said lands, as herein before alleged.

IV

Separate claims of the Okanogan and Methow (or lower Okanogan) Indian tribes or bands.

19. That the particular portion of the said lands, described in paragraph 4 hereof, lying outside of and west of the limits of said Colville Indian Reservation so created by executive order of July 2, 1872, and which lands the petitioners, Okanogan and Methow, (or lower Okanogan) tribes or bands of Indians, occupied, possessed and held in severalty as a part of their original, exclusive and recognized habitat and range, as hereinbefore alleged, is more particularly described as bounded by and included within the following limits:

> Commencing at the intersection of the west bank of the Okanogan River with the international boundary line between the Province of British Columbia, Canada, and the State of Washington, thence west along said line to its intersection with the summit of the main ridge of the Cascade Mountains; thence in a southerly direction along the summit of said main ridge of the Cascade Mountains to a point where the northern tributaries of Lake Chelan and the southern tributaries of the Methow River have their rise; thence southeasterly on the divide between the waters of Lake Chelan and the Methow River to the Columbia River; thence up the Columbia River to the influx of the Okanogan River and up the Okanogan River to the place of beginning.

That the general location and extent of said above described lands is indicated as tracts 4a, 4b, and 4c on the map attached hereto and marked exhibit "C" and made a part hereof. That the said lands aggre-

gate 1,977,500 acres, more or less; the exact survey extent being unknown to petitioners, but now known to the defendant.

Petitioners further state that the defendant, United States, without any treaty, or agreement with the petitioners, or said Okanogan and Methow tribes or bands of Indians; or either of them, having exclusive possessory rights and title thereto as aforesaid; without any cession or relinquishment or abandonment of said rights by said Indian tribes or bands, or either of them; without the consent of said tribes or bands or either of them, and against the will and over the protests of both said tribes or bands of Indians; and without any compensation to them or either of them; and without any lawful warrant, appropriated to its own use all of the said lands and appurtenances, and wrongfully deprived the said tribes and bands of all their right, title, and interest therein and thereto.

That the value of said lands, and of the rights, title and interest of said tribes or bands of Indians therein and thereto is fairly appraised at $1.25 per acre. That the defendant, United States, without lawful warrant and by Executive Orders of date April 19, 1879 and March 6, 1880, appropriated all said lands to its own use as and for a reservation for the Moses tribe of Indians; and thereafter by Executive Orders of date February 23, 1883 and May 1, 1886 without lawful warrant as respect the claims of said petitioners "restored" said lands to its public domain, and has ever since used said lands as part of its public domain without compensation to petitioners or extinguishing their said outstanding claims and title thereto.

That a statement of the facts and circumstances connected with the creation of said Moses or Columbia reservation out of the petitioners said lands, and of the subsequent restoration of said lands to defend-

ant's public domain is hereto attached and made a part of this petition, and is hereby referred to and made a part hereof as though herein set forth in *haec verba*. (See pages 40 to 50, post.)

V

Separate Claims of the San Poeils (or San Poil) and Nespelem Indian Tribes or Bands

20. That the petitioners, said San Poeils (or San Poil) and Nespelem Indian tribes or bands had, as their principal original habitat and range, in addition to the lands lying south of the Columbia River mentioned and described in paragraph 4 hereof, and held in severalty, a certain body of land described as:

> Commencing at a point on the west bank of the Columbia River opposite the mouth of the Spokane River; thence in a general northerly direction to and along the summit of the main ridge dividing the waters of the San Poil River from those of the Columbia and Kettle Rivers, and along the summit of said ridge extended northerly to the said international boundary line between the Province of British Columbia and the State of Washington; thence west along said international boundary line to the summit of the main ridge separating the waters of the Okanogan River from those of the upper Kettle River; thence in a general southerly direction to and along the summit of the divide between the waters of said Okanogan River and those of Nespelem Creek to the north bank of the Columbia River; thence in a general easterly direction along the north bank of the Columbia River to a point opposite the mouth of the Spokane River, the place of beginning.

That, within said last mentioned range and territory, the said San Poeils (San Poil) and Nespelem Indian tribes or bands resided from time immemorial. That they possessed the sole and exclusive possession and use thereof and that the Indians possessory title thereto was recognized by both their

neighbors and by the defendant and that there were no other Indian tribes or bands having, possessiong or claiming any rights or claims thereto or any part thereof. That, except the abortive negotiations held in August, 1873, between defendant's Commissioner and all the petitioners herein, no treaty or agreement or cession of said lands or any right or interest therein has ever been made by the said San Poeil (or San Poil) or Nespelem Indian tribes or bands, or either of them and that their said original Indian possessory title thereto and rights therein are yet outstanding in original strength and purity.

That, after defendant had procured the execution of the so called Moses agreement, hereinafter set out and the ratification thereof, by its Congress, the defendant, without any lawful right or warrant and without the consent of said San Poeil (or San Poil) and Nespelem tribes and bands of Indians, or either of them, and over their protest and objections, brought the said Chief Moses and said band of Moses Indians from the said Columbia Reservation and settled them upon the best lands of said petitioners, San Poeil (or San Poil) and Nespelem tribes or bands, where the said intruding Indians continue to live to the present time.

That, thereafter and in the year 1885, the defendant, in further violation of the said rights of the said San Poeil (or San Poil) or Nespelem Indian tribes or bands, brought Chief Joseph and his band of Nez Perce Indians, whose original range and habitat was in the Wallowa Valley, in the State of Oregon, and which Indians had been removed as military prisoners to Indian Territory after the close of the Nez Perce War in 1877, to Washington Territory and located them on the said lands and habitat of the said San Poeil (San Poil) and Nespelem Indian tribes or bands. That wholly without the consent of said Indian

petitioners and over their protests, said Joseph's band was settled in and upon the lands of the said San Poeil (San Poil) or Nespelem Indian tribes or bands, where said intruding Indians yet remain today.

That by further treaty with the upper and middle bands of Spokane Indians, approved July 13, 1892, (27 Stats. 139), the defendant agreed to and did locate some members of said Spokane tribes upon the said Colville reservation; all of which was without consideration to any of the petitioners and without their consent, and over their protests and in violation of their said rights.

That when said petitioners, San Poeil (San Poil) or Nespelem Indian tribes and bands peaceably and firmly objected and protested against the intrusions by defendant of said strange Indian tribes into and upon their said lands and against said violation of their lawful rights by defendant, the petitioners were compelled by defendant to submit to and suffer said intrusion and invasion of their rights by the threats of their Indian agents, by the coercion of the United States Army troops brought into and upon their said lands, and by the acts of defendant's officers and agents, purporting to act for defendant, in seizing and arresting their Chief Sko-las-kin who, without civil warrant and without civil trial, was seized, arrested and removed by defendant's Indian agents and army officers and, without any civil trial, imprisoned and confined for two years in the United States penitentiary at McNeil's Island, on Puget Sound, then Territory of Washington.

That the number of Moses Indians so intruded upon the San Poil and Nespelem lands were 316, that the number of Joseph or Nez Perce Indians so intruded upon the lands of the said petitioners were 152, an aggregate of 468; that the number of Spokane Indians so placed on petitioners' lands are unknown; that the

present aggregate number of Moses, Joseph and Spokane Indians is unknown to petitioners but petitioners allege that acording to the best of their knowledge and belief that approximately 500 Indians belong to said bands and have been given equal rights with petitioners to the petitioners original habitat and range within said Colville Indian reservation.

That each of said 500 Indians received from defendant $500.00 cash out of the $1,500,000.00 appropriated by Congress in payment of the lands in the North half of said Colville reservation, and each of said 500 Indians has received from defendant further per capita payments of $30.00 and $15.00 from distribution of funds accruing from said Colville reservation. That each of said Indians has been given by defendant an allotment of 80 acres out of the lands within said Colville reservation, which allotments are reasonably worth on an average $15.00 an acre; and that said 500 Indians have also been given by defendant a common and pro rata interest, share and part in the remaining common lands and money of said Colville reservation aggregating $5,695,908.00 on June 30, 1926; that said 500 Indians have also had the equal advantage of all supplies, and of all administration, educational, medical and other services provided on said Colville reservation for the past 42 years, which have been paid for, in substantial part, out of moneys accruing from lands within said Colville Indian reservation; wherein and whereby the petitioners have been deprived of a full enjoyment of all their rights resulting from their original and unextinguished possessory right and title in, to and upon all the lands within the limits of said Colville Indian reservation. That the direct loss to the 2317 petitioners from said matters has been and is substantially as follows:

500-80 acre allotments @$15.00 per acre	$ 600,000.00
Cash per capita payments	272,500.00
Pro rata of common Colville property	1,010,985.00
Supplies, administration, educational, medical and other services expended for their benefit out of proceeds from reservation (estimated only)	200,000.00
	$2,082,485.00

VI

Common Claim of the Petitioners for Loss of Fishing Rights and Privileges

22. That the said original range and habitat of petitioners, as set out in paragraph 4 hereof, included the waters of the Columbia river from the international boundary line south to a point about midway between the mouth of the Methow and the Chelan rivers, and included the waters of all streams flowing into said Columbia within said limits, except the Spokane river. That in their original and undisturbed condition the waters of said Columbia river and its said tributaries within said limits were literally filled with fish, including a variety commonly known as carp or suckers which annually ascended said streams in the spring to spawn, and several varieties of salmon which returned to said stream to spawn in great numbers in the spring and in the early fall.

That from time immemorial petitioners had possessed, used and enjoyed a great fishery in the Columbia river at Kettle Falls, and lesser fisheries in the San Poil, Okanogan and Methow rivers and their tributaries wherefrom they procured their principal food supply. That the said fish within said territory were in better condition to eat and to preserve for food than those taken at points higher up on the Columbia river without the range of petitioners, and that

owing to the dry air of the interior Columbia river basin within plaintiff's said habitat, said fish could be cured, smoked and dried there to much greater advantage than at points lower down said Columbia river and outside of the said habitat of petitioners: and that said fish and salmon constituted petitioners principal food, and it was the common practice and custom of petitioners in addition to catching and preserving their principal food supply from said fisheries to catch, cure, dry and preserve immense quantities of said fish for trade and barter with their neighboring tribes, and that said fisheries in addition to furnishing petitioners with more than half their subsistance, were a great annual profit to petitioners by reason of the value of said fish in trade and barter.

That these petitioners had and held a perpetual right to the use and enjoyment of said streams and of their said original and natural fishing rights and fish and food supplies in an undisturbed and undiminished condition, and that, as such, the said fish resources of the Columbia were capable of continually supporting all the Indian tribes living along its course and accustomed to fish therein; provided that fish were removed in the customary manner, and that no great or unnecessary waste was committed, and the customary numbers of fish were permitted to assend said Columbia river to spawn. That following the creation of Washington Territory and the settlement of Washington and Oregon a large number of white men have invaded the waters of the said Columbia river and through the introduction of seines, fish wheels, fish traps and other devices have caught and removed from said Columbia river at and near its mouth such immense quantities of salmon that for the past fifty years but few fish have been permitted to escape up the said river to spawn, and that since the year 1877 the said quantity of fish in said streams has been

diminished fully 98% and the said fishing rights and privileges held and enjoyed by the petitioners in the waters of the Columbia river and its tributaries have been lost and impaired to more than 98 per cent of their original production and value, and the petitioners have thereby been yearly deprived of more than half their annual food supply and of their principal product for barter and trade.

The petitioners state that their said natural fishing rights were a privilege incident to their possessory rights and, that they had the perpetual right of taking fish from said streams and that it was the duty of defendant at all times to protect and insure to these petitioners in the full, natural and undisturbed enjoyment of said fishing rights, and that said rights have never been relinquished by petitioners or any of them, nor have the petitioners, or any of them ever received any compensation therefore.

That the petitioners have no records or any census of the number of individuals in their respective tribes and bands for the past fifty years, and that petitioners have no exact data as to the precise number of persons now entitled to membership in their respective tribes and bands, the said matters having been a matter of particular attention of the defendant and its Department of Indian Affairs but these petitioners allege that to the best of their knowledge and belief the number of persons entitled to membership in the petitioning tribes for the past fifty years has been and now is approximately 2800 persons. That the said fishing rights and privileges were and are reasonably worth to the petitioners for food and barter an average of one hundred dollars per tribal member per year, or an annual value to petitioners of $280,000.-00, or an aggregate fair value to the petitioners for said fishing rights and privileges of $5,600,000.00;

computing a capital value on said annual return at the rate of 4% per annum.

VII

Claims for Compensation for Loss of Rights in "Common Hunting Ground" East of the Rocky Mountains at the Head Waters of the Missouri River

23. All of these petitioners claim that, from time immemorial, the plains on the east side of the Rocky Mountains, at the head waters of the Missouri River had been the range for countless herds of buffalo, antelope, deer and other game and fur bearing animals, wherein the Indians in the upper Columbia River basin, including these petitioners, had, from time immemorial held, enjoyed and exercised a common hunting right, and from which these petitioners have procured a substantial part of the food, and clothing they customarily used.

That the fact of said common occupation and use of said "common hunting ground" became known to defendant, and its said superintendent and Commissioner of Indian Affairs, Isaac I. Stevens, at the time of and in the course of the negotiations of his various treaties with the several Indian tribes lying on both sides of the Rocky Mountains, during the year 1855, and that it was the intention of the said Stevens, as representing the defendant, and of other various Indian tribes negotiating and intending to negotiate treaties with the defendant, to recognize and preserve the said "common hunting rights" and privileges of the various tribes theretofore and then using and enjoying said hunting privileges, rights and possession in and upon said "common hunting ground".

That, in negotiating the so called Blackfoot Treaty at Fort Benton on October 17, 1855 (11 Stats. 657-658), it was stipulated and agreed in Article 3 thereof:

> The Blackfoot Nation consents and agree that all that portion of the country recognized and defined by the treaty of Laramie as Blackfoot territory, lying within the lines drawn from Hell Gate or Medicine Rock passes in the main range og the Rocky Mountains, in an easterly direction to the nearest source of the Muscle Shell River, thence to the mouth of Twenty-five Yard Creek, thence up the Yellow Stone River to its northern source, and thence along the main range of the Rocky Mountains, in a northerly direction to the point of beginning, shall be a common hunting ground for ninety-nine years, where all the nations, tribes and bands of Indians, parties to this treaty, may enjoy equal and uninterrupted privileges of hunting, fishing and gathering fruit, grazing animals, curing meat and dressing robes. They further agree that they will not establish villages, or in any other way exercise exclusive rights within ten miles of the northern line of the common hunting ground, and that the parties to this treaty may hunt on said northern boundary line and within ten miles thereof."

That, for the purpose of recognizing and protecting the rights of these petitioners and other western Indian tribes then treating, and intending to treat, with defendant, it is further stipulated and provided in said treaty:

> "That the rights of western Indians to a whole or a part of the "common hunting ground" derived from occupancy and possession shall not be affected by this article except so far as said rights may be determined by the Treaty of Laramie."

and that these petitioners assert and claim that they are a portion of the "western Indians" referred to in said provision of said treaty and whose rights are so mentioned, recognized and preserved.

That the location and general extent of said "common hunting grounds" hereinbefore referred to, is shown and indicated by the colored portion of the

map, plaintiff's Exhibit "D", which is herein referred to and made a part hereof; that the intent to so reserve said lands as aforesaid was further set out in that portion of said treaty confirming possessory rights of the contracting Indian parties by the stipulation, "subject, however, to provisions in the third article of this treaty giving right to hunt."

That the common hunting ground, described in Article III of the treaty of October 17, 1855, was intended by the defendant, and understood by the Blackfoot and other contracting parties, to be set aside to provide both the said treaty tribes, and other tribes who were permitted access thereto, including these petitioners, with fresh, dried and smoked meat and other food and subsistence for themselves and their animals, with skins with which to make tents and clothing, and with all other materials necessary for their support and care for a period of ninety-nine years; that said "common hunting ground" was, at the time of said treaty, rich in game, fruits, fur-bearing animals, pasturage for animals, and all other means of subsistence necessary for the support of the petitioners while using the same, and as such was capable of supporting the various tribes of Indians who were permitted access thereto, for the period of ninety-nine years, provided that no great or unnecessary waste was committed within said hunting ground; that fur-bearing animals were abundant within said hunting ground, and could provide petitioners, in addition to subsistence, a great annual profit by reason of the value of their furs and peltries in the fur trade.

That shortly after the treaty of October 17, 1855 was concluded, large numbers of prospectors, miners, hunters, and other whites, invaded the "common hunting ground" and, on account of the rich mineral deposits discovered and the abundance of game and fur-

bearing animals, continued to come into said territory in large numbers and prosecute mining, hunting and trapping and the wholesale slaughter of buffalo for meat and hides to such an extent as to deprive your petitioners and all other Indians of their entire property rights in said "common hunting ground" from within four years from the date of said treaty and to inflict great loss and damage upon your petitioners. That it was defendant's duty to protect petitioners' said hunting rights. That said hunting rights have never been relinquished by the petitioners or any of them, nor have they ever received any compensation for the loss thereof.

That said "common hunting ground", of which your petitioners were deprived, in a manner above set forth, was annually visited by and used by two hunting parties from the petitioning tribes, one in the spring, the other in the fall and winter, and as such was of the reasonable value to your petitioners as follows:

A fair average use value of twenty-five dollars a year for each of the said 2300 members composing the petitioning tribes, or an annual use value to petitioners of $57,500.00; or an aggregate fair value to petitioners of said hunting rights and privileges for the remainder of said 99 year period of $939,990.00; computing a capital value of said annual return at the rate of 4% per annum.

24. That your petitioners have continued at all times to protest against the injustice done them and their lawful rights and claims against the United States as hereinbefore set forth, and that no relinquishment, abandonment, cession or release thereof has ever been given by them or either of them and no satisfaction, or consideration has ever been received by them, or any of them therefor; and that the petitioners, San Poeil (or San Poil) and Nespelem Indian tribes or bands,

for the purpose of preserving their rights and record title intact, wholly refused to participate in, sign or to be parties to the agreements, signed by others of the said petitioners, for the subsequent sale and opening of their lands on said Colville reservation to settlement.

That the petitioners do not know and are unable to determine the amount of money appropriated, expended and used by defendant for the benefit of petitioners and which may be offset against their claims.

That your petitioners do not know, and that they have been unable to ascertain the amount of gratuities which the defendant is entitled to claim as an offset against petitioners' claims. That the fair and reasonable value of all lands of petitioners as hereinbefore described is $1.25 per acre. That the quantity of lands to which the petitioners were entitled and which were taken for the use and benefit of the United States, and the value of petitioners said claims are as follows:

Lake and Colville tribes or bands, east of the Columbia river and the Colville Indian reservation 1,238,144 acres

Nespelem and Methow tribes or bands, lands south of the Columbia river and the Colville Indian reservation 570,000 acres.

Okanogan and Methow tribes or bands, lands west of the Okanogan river and the Colville Indian reservation 1,977,500 acres.

Total 3,485,644 acres at $1.25 per acre or $4,351,055.

San Poeil (or San Poil) and Nespelem Indian tribes or bands for invasion of rights and lands within the Colville Indian reservation: $2,090,985.00. All the petitioners for loss of fishing rights and privileges, $5,600,000.00; and for loss of hunting and other rights in the "common hunting grounds", $939,999.90.

Wherefore, and by reason of the premises aforesaid,

the Okanogan, Methow, San Poeil (or San Poil), Nespelem, Colville and Lake Indian tribes or bands, of the State of Washington (commonly known as the Okanogan and Colville tribes of Indians), sue the United States for an accounting and claim of the United States, $13,048,039.90, without interest, and pray this Court to render judgment in favor of the petitioners against the defendant in such sums as upon a full and final accounting shall be found due, and for such further and other relief as may be proper both at law and in equity; and that the court decree the fee or fees to be paid the attorney representing petitioners, as provided in the said jurisdiction act and for petitioners costs, to be taxed by the court.

The Okanogan, Methow, San Poeil (or San Poil), Nespelem, Colville and Lake Indian tribes or bands of the State of Washington, (commonly known as the Okanogan and Colville tribes of Indians),

Petitioners,

By their Attorney of Record,

William S. Lewis.

United States of America
State of Washington } ss:
County of Spokane

William S. Lewis, being first duly sworn on oath, deposes and says: That he is the attorney of Record for the Okanogan, Methow, San Poeils (or San Poil), Nespelem, Colville and Lake Indian tribes or bands of the State of Washington, being employed under contract between said Indians (commonly known as the Okanogan and Colville tribes of Indians), and said William S. Lewis which contract has been duly approved by the Commissioner of Indian Affairs and the Secretary of the Interior as provided by law; that affiant has read the foregoing petition herein subscribed and that affiant verily believes the facts stated in the foregoing petition to be true to the best of his knowledge, information and belief.

William S. Lewis.

Subscribed and sworn to before me, a notary public in and for the State of Washington, this 22nd day of March, 1927.

Joseph Rosalow,
Notary Public.

May 14, 1928.
My commission expires

NOTARY
SEAL

Petitioners' Supplemental Statement

Of the facts and circumstances surrounding the creation of the Moses or Columbia reservation out of the petitioners' lands, and defendant's subsequent transfer of said lands to its public domain.

Supplementing the allegations relating to the separate claims of the Okanogan and Methow tribes, or bands, of Indians as set forth in subdivision IV hereof, said petitioners further state:

I

The Columbia, or Moses, Indian Reservation

1. That from time immemorial certain bands of Indians, variously named or called the Pisququose, the Ko-wah-chins, the Sin-kaoo-ish (Sin-kiuse), the Isle de Pierre, the Rock Island, and, in later years, the Columbia or Moses band of Indians had as their original habitat and range certain lands in the coulees and plains on the east bank of the Columbia River in the then Territory of Washington, from La-cos-tum (Saddle Mountain) near the present town of Beverly, northward beyond "Rock Island" to Lake Chelan and its tributaries: said habitat and range being wholly outside of and south of the habitat and range of the petitioners, and the location thereof generally indicated as tract 3 in petitioner's Exhibit "C" attached hereto. That said tribe, hereafter referred to as the "Moses band" of Indians were a turbulent, warlike people; allied to and a part of the great Yakima Indian nation; that in the years 1877-1883 the principal chief of said band was one Que-tal-a-kin or Moses, the son of a noted war chief of said tribe, a reputed cousin of Chief Joseph of the Nez Perce tribe, and married to a daughter of Owhi of the Kittitas Yakima tribe or band. That said chief Moses was a man of question-

ed character, reckless morals, and of great prestige and influence, both by reason of his said family connections and his own personality, superior intelligence and ability, and that said Chief Moses attracted and gathered into his said band the so called "renegade Indians" from the various Yakima tribes or bands.

That said tribe or band of Indians, now known and hereafter referred to as the Moses band, had been present at and had participated in and been parties to the Camp Stevens treaty negotiated between the defendant and said Yakima Indian nation in the Walla Walla valley in June 9, 1855 (12 Stats. 951) and by the terms of said treaty had ceded their said habitat and lands to defendant, but that after the ratification of said treaty said band refused to remove to the Fort Simco or Yakima Indian Reservation with the other Yakima bands and thereafter continued to reside in and occupy their said original habitat, and became a cause of concern to defendant's Indian Office. That at the time of the Nez Perce War of 1877 and thereafter the said Moses band of Indians was restless and arrogant, and that members of said tribe were suspected of complicity in the murder of white settlers and the band and their said chief, Moses, became a source of friction with white settlers and serious concern to the defendant.

2. That on April, 19, 1879 the defendant, United States, for the purpose of removing said Moses band further from immediate contact with white settlers; preventing possible hostilities; and to conciliate said chief Moses and his band and insure their good conduct, by Executive Order on said day created and set aside for said chief Moses and his band of Indians the Columbia Indian Reservation, designating therefor the lands bounded as follows:

> Commencing at the intersection of the 40-mile limits of the branch line of the Northern Pacific

railroad with the Okanogan River; thence up said river to the international boundary line between the U. S. and British Columbia; thence west on said boundary line to 44 deg. W. longitude from Washington; thence south on said meridian to its intersection with the 40-mile limits of the branch line of the Northern Pacific railroad; and thence with the line of said 40-mile limits to the place of beginning.

That the major portion of said lands so set apart were part of the original habitat and range of the petitioners, Okanogan and Methow Indian tribes or bands and their location is indicated as tracts 4a and 4b in petitioner's Exhibit "C" attached hereto, and the only portion thereof which was public domain and which defendant had the right to grant and set apart for the use and benefit of said Chief Moses and his band was the small portion of said lands lying west of the said range and habitat of said petitioners, Okanogan and Methow Indian tribes or bands, and indicated in separate color in petitioners said Exhibit "C".

That thereafter on March 6, 1880, the defendant by further Executive Order set apart as an addition to the Columbia Reservation a further tract of land, designated herein as tract 4c on the map attached hereto marked Exhibit "C". That the most of said lands included in said addition to said Columbia reservation were a further part of the original habitat and range of the petitioners, Okanogan and Methow tribes or bands of Indians. That the lands described in said Executive order are:

Commencing at a point where the S. boundary line of the reservation created for Chief Moses and his people by Executive Order dated April 19, 1879, intersects the Okanogan River; thence down said river to its confluence with the Columbia River; thence across and down the east bank of the Columbia River to a point opposite the

river, forming the outlet to Lake Chelan; thence across said Columbia River and along the S. shore of said outlet to Lake Chelan; thence following the meanderings of the S. bank of said Lake to the mouth of Shehakin creek; thence up and along the S. bank of said creek to its source; thence due W. to 44 degrees longitude W. from Washington; thence N. along said meridian to the S. boundary of the reservation created by Executive order of April 19, 1879; thence along the south boundary of said reservation to the place of beginning.

That the only portion of said lands which was public domain and which the defendant had the right to grant and set apart for the use and benefit of said Chief Moses and his said band was the small portion of said lands lying southwest of said range and habitat of said petitioners, Okanogan and Methow Indian tribes and bands, and indicated in separate color in petitioner's said Exhibit "C".

That the said Executive Orders were made without the knowledge or the consent of said petitioners, the Okanogan and Methow tribes or bands of Indians, and against their will, and the said Orders were made without any treaty or relinquishment by them of their said rights, or any compensation to the said Okanogan and Methow tribes or bands, and without any lawful warrant. That pursuant to said Executive Order defendant moved said Moses band of Indians from their said original habitat and range, into and upon the lands embraced within the boundaries of said Columbia Indian Reservation, and the defendant appropriated for its own use and that of said Moses band of Indians the said original range and habitat of the said petitioners, the Okanogan and Methow tribes or bands of Indians; all of which petitioners allege was done in violation of the lawful rights of the said petitioners to the said soil and its occupancy under the laws of the United States and was con-

trary to the established Indian policy of the United States.

3. That thereafter some valuable mineral lands being discovered within the northern limits of said tract, by Executive Order of February 23, 1883 the President restored to the public domain the northern portion of said Columbia reservation, towit that portion indicated as tract 4a in the Exhibit "C" attached to this petition, and described as follows:

> Commencing at the intersection of 44 degrees W. longitude from Washington, with the boundary line between the U. S. and British Columbia; thence due S. 15 miles; thence due east to the Okanogan River; thence up said river to the boundary line between the U. S. and British Columbia; thence W. along said boundary line to the place of begining.

That said lands comprised 749,200 acres.

That pursuant to said Executive Order of February 23, 1883 the defendant appropriated said last described lands to its own use as part of its public domain, and these petitioners state that in so far as the said Okanogan and Methow tribes or bands of Indians are concerned both said grant of said Columbia reservation to said Moses tribe, and said withdrawal and restoration of said tract last mentioned to the public domain were in violation of, and void as respects, the then existing possessory rights and unextinquished Indian title of said petitioners thereto.

4. That in June 1883 the defendant having further trouble with said Chief Moses and his band, the defendant instructed one of its army officers, Capt. F. D. Baldwin of the 5th U. S. Infantry to bring said Chief Moses, together with Sar-aarp-kin, chief of an Okanogan band then living near Loomis, and two Indians from bands affiliated with the petitioners, towit: one Tonasket and one Lot, to Washington, D. C. for a conference. Thereafter on July 2, 1889, following a talk

and conference at Washington D. C. by defendant's then Secretary of the Interior, and Commissioner of Indian Affairs with said Chief Moses and the other Indians, Sar-sarp-kin, Tonasket and Lot, the following memoranda or agreement of said conference was reduced to writing and signed by all said partes except said Lot, towit:

"AGREEMENT WITH THE COLUMBIA AND COLVILLE, 1883

July 7, 1883,—Ratified July 4, 1884, 23 Stat., 79.

In the conference with chief Moses and Sar-sarp-kin, of the Columbia reservation, and Tonasket and Lot, of the Colville reservation, had this day, the following was substantially what was asked for by the Indians:

Tonasket asked for a saw and grist mill, a boarding school to be established at Bonaparte Creek to accommodate one hundred pupils (100), and a physician to reside with them, and $100 (one hundred) to himself each year.

Sar-sarp-kin asked to be allowed to remain on the Columbian reservation with his people, where they now live, and to be protected in their rights as settlers, and in addition to the ground they now have under cultivation within the limit of the fifteen miles strip cut off from the northern portion of the Columbia reservation, to be allowed to select enough more unoccupied land in severalty to make a total of Sar-sarp-kin or four square miles, being 2,560 acres of land, and each head of a family or male adult one square mile; or to move on to the Colville Reservation, if they so desire, and in case they so remove, and relinquish all their claims to the Columbia Reservation, he is to receive one hundred (100) head of cows for himself and people, and such farming implements as may be necessary.

All of which the Secretary agrees they should have, and that he will ask Congress to make an appropriation to enable him to perform.

The secretary also agrees to ask Congress to make an appropriation to enable him to purchase for Chief Moses a sufficient number of cows to furnish each one of his band with two cows; also to give Moses one thousand dollars ($1,000) for the purpose of erecting a dwelling-house for himself; also to construct a saw mill and grist mill as soon as the same shall be required for use; also that each head of a family or each male adult person shall be furnished with one wagon, one double set of harness, one grain cradle, one plow, one harrow, one scythe, one hoe, and such other aggricultural implements as may be necessary.

And on condition that Chief Moses and his people keep this agreement faithfully, he is to be paid in cash, in addition to all of the above, one thousand dollars ($1,000) per annum during his life.

All this on condition that Chief Moses shall remove to the Colville Reservation and relinquish all claim upon the Government for any situate elsewhere.

Further, that the Government will secure to Chief Moses and his people, as well as to all other Indians who may go on to the Colville Reservation and engaged in farming, equal rights and protection alike with all other Indians now on the Colville Reservtion, and will afford him any assistance necessary to enable him to carry out the terms of this agreement on the part of himself and his people. That until he and his people are located permanently on the Colville Reservation, his status shall remain as now, and the police over his people shall be vested in the military, and all money or articles to be furnished him and his people shall be sent to some point in the locality of his people, there to be distributed as provided. All other Indians now living on the Columbia Reservation shall be entitled to 649 acres, or one square mile of land, to each head of family or male adult, in the possession and ownership of which they shall be guaranteed and protected. Or should they move on to the

Colville Reservation within two years, they will be provided with such farming implements as may be required, provided they surrender all rights to the Columbia Reservation.

All of the Foregoing is upon the condition that Congress will make an appropriation of funds necessary to accomplish the foregoing, and confirm this agreement; and also, with the understanding that Chief Moses or any of the Indians heretofore mentioned shall not be required to remove to the Colville Reservation until Congress does make such appropriation, etc.

H. M. Teller
Secretary of Interior,
H. Price
Commissioner of Indian Affairs
Moses (his x mark),
Tonasket (his x mark,
Sar-sarp-kin (his x mark.
George (his x mark) Hereing.
J. L. Sherwood,
Interpreter for the Government.
Mark D. Baldwin,
Captain, Fifth Infantry.

That said memoranda or agreement was thereafter presented to and ratified by Congress on July 4, 1884 (23 Stats. 79).

5. That thereafter by Executive Order on May 1, 1886 the defendant restored "to the public domain" the 2,243,040 acres of land theretofore embraced in said diminished Columbia reservation, and appropriated to its own use all of said lands. That said restoration of said lands to the public domain was ineffectual for any purpose as respects the then existing and unextinguished possessory rights and Indian title of said petitioners, Okanogan and Methow tribes or bands of Indians in, to and upon said lands.

Petitioners state that the defendant's President, officers and representatives acting at the time of the

creation of the said Columbia reservation by Executive order of April 19, 1879, and of the Executive Order of March 6, 1880, creating said addition to said Columbia reservation, and at the time of the said Executive Order of February 23, 1883 restoring the north fifteen miles of said Columbia reservation "to the public domain", and at the time of said negotiation and ratification of said Moses agreement for relinquishment rights in said Executive Order Columbia reservation, and at the time of the said Executive Order of May 1, 1886, restoring said lands to "the public domain" were uninformed as to the petitioners' landed rights, and prior and unextinquished Indian title in, to and upon all the lands affected by said Orders, and petitioners further state that at all said times defendant, its President, officers and agents acted under the erroneous impression that the original Indian title to all said lands had been extinguished and that said lands were at said times a lawful subject of such disposition as a part of "the public domain" of the defendant.

Your petitioners state that their rights should not be affected by, nor should they in any way be bound or prejudiced by said Moses agreement for the reason: that your petitioners were not consulted about said conference and that no tribal councils of the petitioners were called or held prior to the departure of said four Indians for Washington, D. C. and that none of said four Indians had any right, authority or delegated authority to speak for or to bind any of the petitioning tribes or bands of Indians. Petitioners further state that said agreement was never presented to or ratified by them, or any of them.

That Sar-sarp-kin was a chief or leading man of a small band of Okanogan Indians then living on their original habitat west of the Okanogan River, that he had no official power or delegated authority to

bind even the members of his own band, and that in signing said memoranda he did not understand that he was doing more than affirming his expressed desire to be "allowed to remain" where he "now lived". That said Sar-sarp-kin never moved on to the Colville reservation or relinquished the claims of himself and his band to lands in the Columbia reservation.

Your petitioners further state that of the two said Indians described as "of the Colville Reservation" Lot was a Spokane Indian, took no part and did not sign agreement; and that Tonasket's participation was solely limited to a statement of the needs of himself and his immediate tribe. That neither said Lot, Tonasket or Sar-sarp-kin understood, assented to or meant to cede, relinquish or abandon the tribal rights and claims of the Okanogan and Methow tribes and bands to their said original Indian possessory rights and unextinguished title to their lands, theretofore granted to the Moses tribe by the defendant, nor did either of the said Indians consent that said Moses tribe be given any rights in the petitioner's original habitat and lands lying within the limits of the Colville Reservation.

The petitioners further state that the negotiations and agreement, evidenced by said memoranda, with respect to relinquishment of rights on the said Columbia reservation, were had principally between the defendant's said representatives, and Moses of the Columbia reservation and that the defendant's said Secretary and Commissioner, then conducting said negotiations, then acted under the assumption that petitioners had no rights within said Columbia reservation and that no consent from petitioners was necessary to enable defendant to confer upon members of said Moses band and other Indians whom defendant might see fit to place thereon an equal right with petitioners in the lands within the limits of said Colville reservation,

Your petitioners, with respect to said Moses agreement, further represent and state that at said time these petitioners were the wards of the defendant, and then entitled to such just and fair treatment as the defendant owed to an ignorant, dependent people under its care and protection, and neither said Lot who attended, nor said Tonasket and Sar-sarp-kin, who signed said memoranda could read or write English. and that as to these petitioners said memoranda should not be construed or held as any binding relinquishment of their rights in 1,877,500 acres of their original habitat lying west of the Okanogan river, or as a grant or cession to said Moses tribe or any other Indians of equal rights in and to petitioners' original habitat east of the Okanogan river, embraced within the limits of the Colville Indian reservation, and these petitioners state that said agreement is, as respects these petitioners, indefinite in its terms, obscure as to its meaning, and lacking in any fair or adequate consideration to be binding on these petitioners, and petitioners state that the said Moses agreement is as to them and their rights, void and of no effect.

The Okanogan, Methow, San Poeil (or San Poil), Nespelem, Colville and Lake Indian tribes or bands of the State of Washington, (commonly known as the Okanogan and Colville tribes of Indians),

Petitioners,

By their Attorney of Record,

William S. Lewis.

United States of America)
State of Washington) ss:
County of Spokane)

William S. Lewis, being first duly sworn on oath, deposes and says: That he is the attorney of Record for the Okanogan, Methow, San Poeils (or San Poil), Nespelem, Colville and Lake Indian tribes or bands of the State of Washington, being employed under contract between said Indians (commonly known as the Okanogan and Colville tribes of Indians), and said William S. Lewis which contract has been duly approved by the Commissioner of Indian Affairs and the Secretary of the Interior as provided by law; that affiant has read the supplemental statement herein subscribed and that affiant verily believes the facts stated in the foregoing statement to be true to the best of his knowledge and belief.

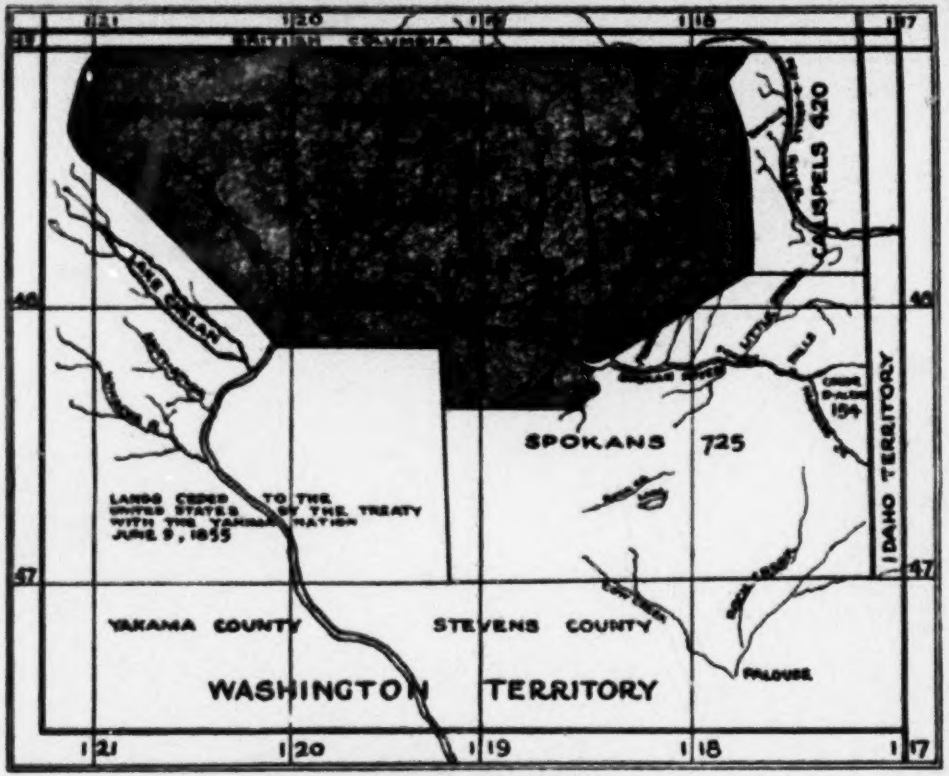
William S. Lewis.

Subscribed and sworn to before me, a notary public in and for the State of Washington, this 22nd day of March, 1927.

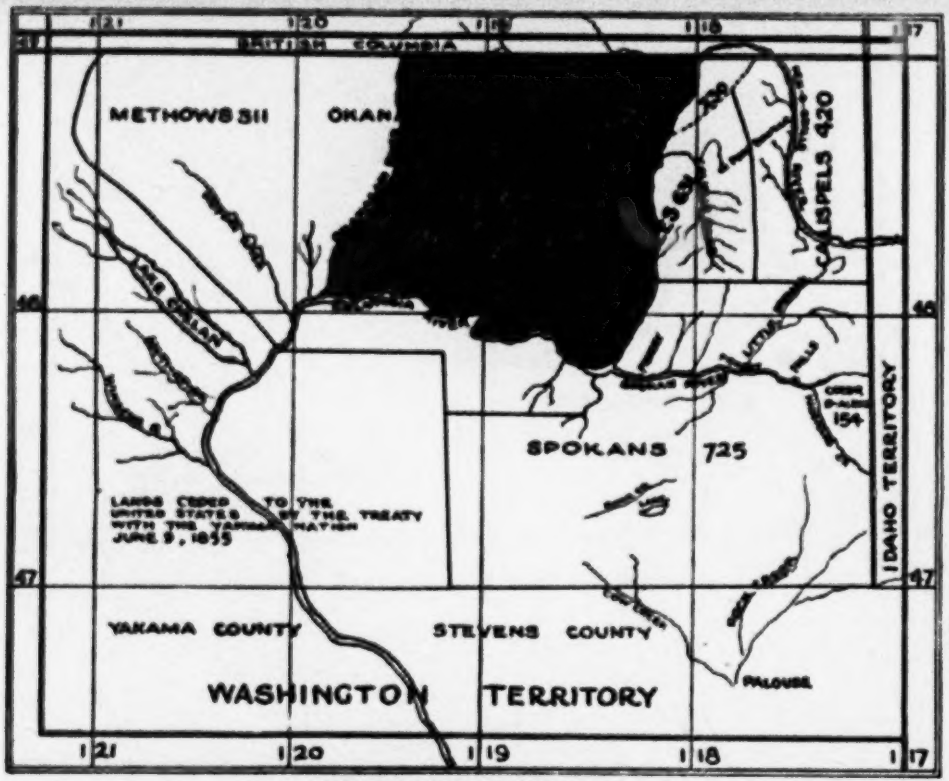
Joseph Rosslow,
Notary Public.

May 14, 1928.
My commission expires

NOTARY SEAL

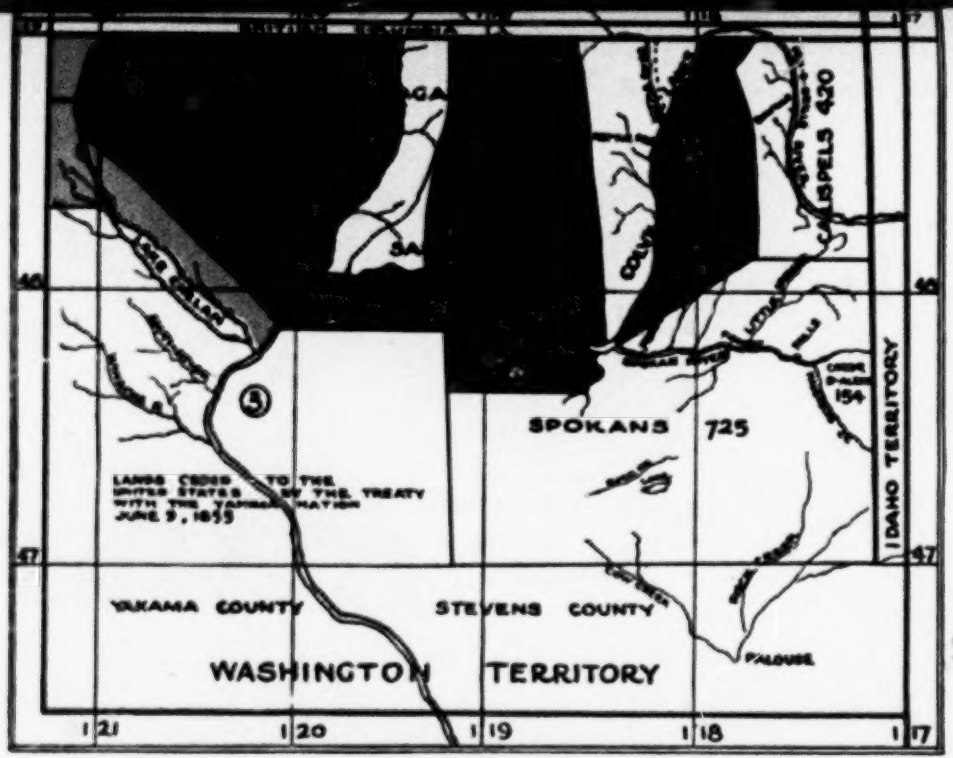


PETITIONERS' EXHIBIT "A"



PETITIONERS' EXHIBIT "8"

Map of N. E. portion of Washington showing in red that portion of the original habitat and range of the petitioners, Okanogan, Methow, San Poeil (or San Poil), Nespelem, Colville and Lake Indians included in the Colville Indian reservation credited by Executive order July 2, 1872



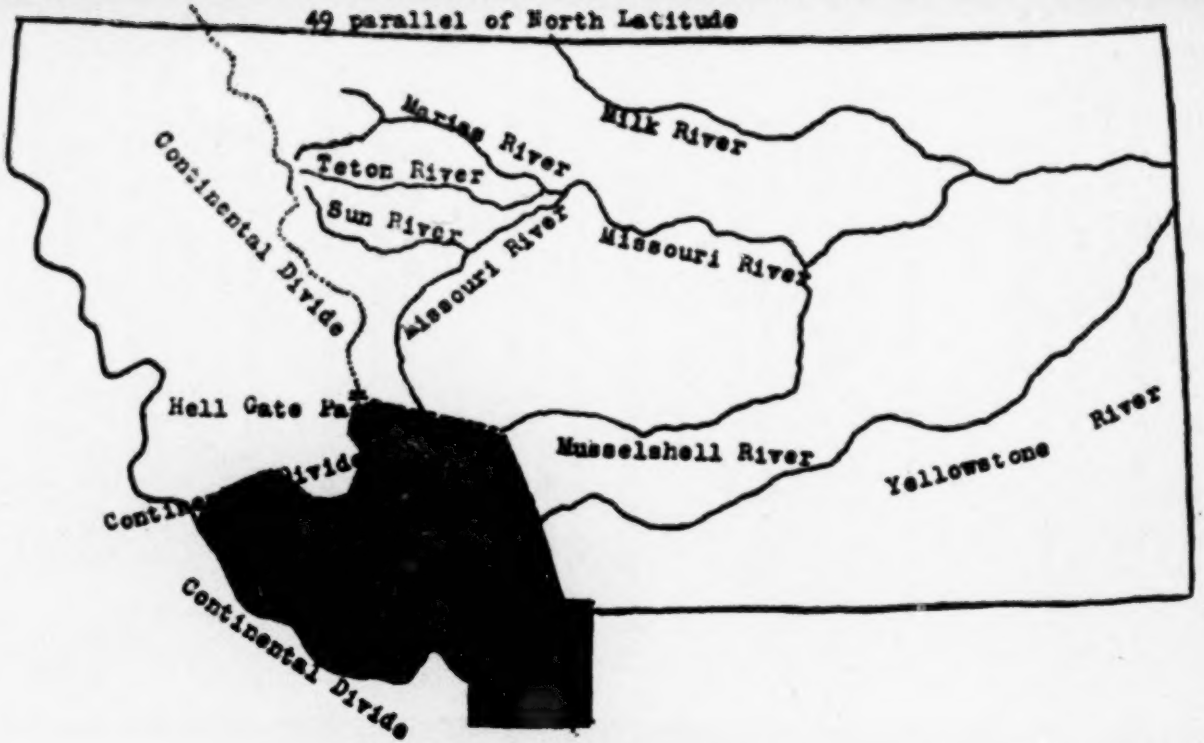
PETITIONERS' EXHIBIT "C"

Map of N. E. portion of Washington showing in red the various portions of petitioners' habitat and range outside the limits of the Colville reservation, appropriated by defendant without treaty or compensation, for which compensation is here claimed:

1. Lands for which the Colville and Lake tribes or bands ask compensation.
2. Lands for which the Nespelem and Methow tribes or bands ask compensation.

4a, 4b, 4c. Lands for which the Methow and Okanogan tribes or bands ask compensation.

5. Lands for which the San Poil and Nespelem tribes or bands ask compensation.



PETITIONERS' EXHIBIT "D"

Map of Montana showing the "common hunting grounds" established and reserved by Article 3, treaty of Oct. 17, 1855, in use of which petitioners participated, and for loss of which they claim compensation.

[fol. 60] II. History of Proceedings

On May 7, 1927, the defendant filed a general traverse to the plaintiffs' petition.

On June 28, 1927, the defendant filed a motion for leave to file a demurrer. This motion was allowed on July 6, 1927, and the demurrer filed.

III. Demurrer—Filed July 6, 1927

Now comes the Assistant Attorney General and demurs to the petitioner in the above-entitled cause for the reason that the same is not within the jurisdiction of the Court.

Herman J. Galloway, Assistant Attorney General.
George T. Stormont, Attorney.

IV. Argument and Submission of Demurrer

On January 9, 1928, this case was argued and submitted on demurrer by Mr. George T. Stormont, for the defendant, and by Mr. William S. Lewis, for the plaintiffs.

[fol. 61] V. **Opinion of the Court by Campbell, Ch. J., on Defendant's Demurrer**—Filed April 16, 1928

Campbell, Chief Justice, delivered the opinion of the court:

A petition was filed March 28, 1927, by the Okanogan and other tribes or bands of Indians alleging that the suit is brought under authority of an act of Congress described as Senate bill No. 3185, 69th Congress, 1st session, entitled "An act authorizing certain Indian tribes and bands, or any of them, residing in the State of Washington, to present their claims to the Court of Claims." A copy of this alleged act appears in the petition. It is further al-

leged that this bill having been duly passed by both Houses of Congress, on June 23, 1926, was signed by the presiding officers thereof and "duly attested as by law required" and thereafter, on June 24, 1926, was duly presented to the President of the United States, and that "the said bill not being returned by the President within 10 days after it was so presented to him, or at all, the same became and now is a law in like manner as if he had signed it." The demurrer presents the one question whether in the circumstances stated the bill ever became a law.

Article I, section 7, clause 2, of the Constitution of the United States is as follows:

"Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States. If he approve he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. * * * If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress, by their adjournment prevent its return, in which case it shall not be a law."

The bill was presented to the President on June 24, 1926. On July 3, 1926 (eight days thereafter, Sunday excepted), there was a final adjournment of the first session of the 69th Congress. The President did not approve or sign the bill. He did not make any return of it to either House. He did not deposit it with the Secretary of State as a law. When the 69th Congress reconvened in its second session [fol. 62] on December 6, 1926, no return of the bill or of objections thereto had been or was made. These facts, it is urged for the plaintiffs, caused the bill to become a law. The Government contends to the contrary. The exact question it is conceded has not been decided by the Federal courts, but with great industry counsel for the parties have produced historical precedents and decisions by State courts supposed to bear upon or decide similar questions.

Under the provision quoted a bill which shall have passed the two Houses of Congress shall, before it become a law, be presented to the President. "The only duty required of the President, by the Constitution in regard to a bill which he approves, is that he shall sign it. Nothing more. * * * Even in the event of his approving the bill, it is not required that he shall write on the bill the word approved, nor that he shall date it." Gardner v. Collector, 6 Wall. 499, 506. If the bill shall not be returned by him within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it. "Here are two courses of action by the President in reference to a bill presented to him, each of which results in the bill becoming a law. One of them is by signing the bill within ten days and the other is by keeping it ten days and refusing to sign it. * * * Yet, in the latter case, no evidence is required of the President, either by the Constitution or in actual practice, to show that he had ever received or considered the bill." Gardner v. Collector, supra. But if the President does not approve the bill, he shall return it with his objections, and he has ten days (Sundays excepted) within which this duty may be discharged. It seems to us that these provisions are not intended to make the President a part of the law-making power, because Article I, section 1, of the Constitution provides that "all legislative powers herein granted shall be vested in a Congress of the United States" which shall consist of a Senate and House of Representatives. See Burton v. United States, 202 U. S. 344, 367. They do not confer the power of peremptory veto though the term veto is now generally applied to a return of a bill by the President "with his objections." Story gives reasons why the President "should possess a qualified negative." Sec. 884, et seq. And Chancellor Kent says: "A qualified negative answers all the salutary purposes of an absolute one, for it is not to be presumed that two-thirds of both Houses of Congress on reconsideration * * * will ever concur in any unconstitutional measure." 1 Kent's Com. 255. In Weil's case, 29 C. Cls. 523, Judge Nott enters upon a lengthy discussion of the law-making

power, which we refer to without committing ourselves to the conclusions reached in the particular case. Pointing out differences between the English and American systems, he says (p. 539): "Under the American Constitution the assent of the President is not essential to the enactment of a single law. His authority over an act of Congress is simply revisory and advisory. * * * If he does not approve, he does not forbid; he does not, in the sense of the Roman law, veto. On the contrary, he returns the bill to Congress with his reasons why it should not become a law —reasons which are not fiats but which are addressed to the legislative intelligence. And he might have added as further showing that the President's assent is not necessary, that if the requisite two-thirds of each House approve [fol. 63] the bill it becomes a law without being presented again to the President. The plaintiffs' contention would seem to imply that the provision "If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him the same shall be a law in like manner as if he had signed it" is all that is said, but the contention disregards the following phrase, "unless the Congress by their adjournment prevent its return, in which case it shall not be a law." The ten days are provided for the President's deliberation and the proper formulation of his objections. They are not needed where he approves the bill or where by his inaction he is willing the bill shall become a law. In the latter case it is declared the bill shall be a law and in another category provided for it is just emphatically declared that the bill shall not be a law, that being where "Congress by their adjournment prevent its return." The contention here is that the Bill became a law because the adjournment of the Congress, which took place within the period of ten days (Sundays excepted) was only an adjournment of the 1st session of the 69th Congress, and the President did not return the bill to the Congress in its next session or in the meantime to officers or employees of the House or Senate who may have been in their places and have kept it until the Congress was again in session. Unless we ignore the provision for a return of the bill within ten days (Sundays excepted), in case the President objects to it, it is manifest

that he should have lodged it with these officers or employees within that period, if the contention have any merit. We look in vain for any requirement that the President return the bill after ten days (Sundays excepted) shall have expired. It is also manifest that unless the concluding phrase, "in which case it shall not be a law," be ignored, there is no merit in the contention. Transmitting the bill to either employees or to the next session will not vitalize a bill that upon the adjournment the Constitution declares shall not be a law. The attempted distinction between adjournment of one or the other session is unsound. The fact in the instant case is that the first session of the 69th Congress adjourned several days before the expiration of the ten-day period provided for, and that was an adjournment of the Congress. The Constitution does not limit the time of adjournment to the final adjournment at the second session, and the courts have no right to so limit it. In La Abra Silver Mining Company v. United States, 175 U. S. 423, it was held that a bill signed by the President during a recess of the Congress and within the period of ten days (Sundays excepted) after it was presented to him became a law, but the court pretermitted the question whether he can sign a bill after the final adjournment of Congress for the session. In the course of the opinion it is said (p. 454): "But the Constitution places the approval and disapproval of bills, as to their becoming laws, upon a different basis. If the President does not approve a bill, he is required within a named time to send it back for consideration. But if by its action, after the presentation of a bill to the President, during the time given him by the Constitution for an examination of its provisions and for approving it by his signature, Congress puts it out of his power to return it, not approved, within that time to the House in which it originated, then the bill falls and does not become a law."

[fol. 64] What we have said accords with the early view taken of the effect of an adjournment. In November, 1812, President Madison sent a message to Congress informing them that "the bill failed to become a law" because it had been presented to him "at an hour too near the close of the session to be returned for reconsideration." President

Jackson took a like course in 1832 with a bill passed at the first session and presented to him and the Congress had adjourned within the ten-day period. President Tyler informed the Congress in 1842 that two bills had failed to become laws because presented within the period of ten days (Sunday excepted), but in the meantime the Congress had adjourned. As already said, we do not find a provision requiring the President to call attention to the fact that the bill has failed to become a law, though in the instances mentioned and perhaps in others such a course was pursued.

We conclude that the bill in question never became a law, and therefore that the demurrer should be sustained and the petition dismissed. And it is so ordered.

Moss, Judge; Graham, Judge; and Booth, Judge, concur.

Green, Judge, took no part in the decision of this case.

[fol. 65] VI. JUDGMENT

At a Court of Claims held in the City of Washington on the 16th day of April, A. D., 1928, judgment was ordered to be entered as follows:

This case was submitted upon the defendant's demurrer to the plaintiffs' petition. On consideration whereof the court is of opinion that the demurrer is well taken.

It is therefore adjudged and ordered that the defendant's said demurrer be sustained and that the petition be and the same is hereby dismissed.

VII. PROCEEDINGS AFTER THE ENTRY OF JUDGMENT

On June 9, 1928, the plaintiffs filed a motion for a new trial. On September 28, 1928, the court ordered said motion to the Law Calendar, and set same for hearing on October 15, 1928.

On October 15, 1928, the plaintiffs' motion for a new trial was argued and submitted by Mr. William S. Lewis, for the plaintiffs, and by Mr. William F. Norris, for defendant.

On October 22, 1928, the court entered the following order on said motion:

It is ordered this 22nd day of October, 1928, that the plaintiff's motion for new trial be and the same is overruled.

[fol. 66] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 33,874. Court of Claims. Term No. 565. The Okanogan, Methow, San Pœlis (or San Poil), Nespelem, Colville, and Lake Indian Tribes or Bands of the State of Washington, Petitioners, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed December 4th, 1928. File No. 33,874.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 21, 1929

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
JAN 4 1929

In the Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 565.

THE OKANOGAN, METHOW, SAN POILS (or SAN POIL), NESPELEM, COLVILLE, AND LAKE INDIAN TRIBES OR BANDS OF THE STATE OF WASHINGTON,

vs.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

WILLIAM S. LEVIN,
Attorney for Petitioners.

A. R. SAWYER,
JOHN G. CARTER,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1928.

No. 565.

THE OKANOGAN, METHOW, SAN POEILS (or SAN POIL), NESPELEM, COLVILLE, AND LAKE INDIAN TRIBES OR BANDS OF THE STATE OF WASHINGTON,

vs.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the court below in this case has not yet been officially reported.

The date of judgment of the court below in this case is April 16, 1928 (R. p. 66).

Petitioner's motion for rehearing was denied October 22, 1928 (R. p. 67).

Petitioners claimed below that Senate bill No. 3185, 69th Congress, First Session, entitled: "An Act authorizing certain Indian tribes and bands, or any of them, residing in the State of Washington, to present their claims to the Court of Claims," having been duly presented to the President for his consideration and not having been returned by him with his objections to the House in which it originated, as provided by Article 1, Section VII, Clause 2 of the Constitution of the United States, thereby became a law (R. pp. 6-7).

The court below held that this bill never became a law (R. p. 66).

The jurisdiction of this Court is invoked under the provisions of Chapter 229, Section 3 (b) of the Act approved February 13, 1925 (43 Stat. 939).

Attention is invited to the following cases, under which it is believed the writ prayed for should be granted:

Forsyth v. *Hammond* (166 U. S. 506; 41 L. ed. 1095)
Fields v. *United States* (205 U. S. 292; 51 L. ed. 807)
Hamilton Brown Shoe Co. v. *Wolf Bros. Co.* (240 U. S. 251; 60 L. ed. 629)
Magnum Import Company v. *Coty* (262 U. S. 159; 67 L. ed. 922)

STATEMENT OF THE CASE

Senate Bill No. 3185, 69th Congress, First Session, entitled: "An Act authorizing certain Indian tribes and bands, or any of them, residing in the State of Washington, to present their claims to the Court of Claims," having been duly passed by both Houses of Congress and having been duly signed and attested by the presiding officers thereof, was duly presented to the President for his consideration on June 24, 1926. On July 3, 1926 (eight days thereafter, Sundays excepted) the First Session of the 69th Congress adjourned for the summer recess. The President did not sign said bill, or file it with the Secretary of State without his signature, or return it with his objections to the House in which it originated within ten days (Sundays excepted) after it was so presented to him, or at any time thereafter.

Believing that said bill had thereby become a law, in accordance with the provisions of Article 1, Section VII, Clause 2 of the Constitution of the United States, petitioners duly filed their petition in the Court of Claims, as therein authorized. The defendant demurred to said petition, on the ground that said bill had never become a law. The court below sustained this demurrer and accordingly dismissed said petition (R. pp. 61-2, 66).

Petitioners' motion for rehearing was denied October 22, 1928 (R. pp. 66-7).

Whereupon, petitioners have prayed this Honorable Court that a writ of certiorari may issue to the Court of Claims to review its judgment herein (R. pp. 1-4).

ASSIGNMENT OF ERRORS

1. The court below erred in not giving proper consideration to the purpose, intent, and policy of the makers of the Constitution, in the light of contemporary history.

2. The court below erred in not giving proper consideration to the particular mischief this language was intended to prevent.

3. The court below erred in so construing the provision as to defeat its evident purpose, when the construction urged by petitioners is equally accordant with its words and sense and would enforce and protect such purpose.

4. The court below erred in not giving proper consideration to the subject, context, and the intention of the makers of the Constitution in construing this provision.

5. The court below erred in not giving due consideration to the obvious implication from the language of the constitutional provision that it was the President's duty to return the bill with his objections, if in any way reasonably possible to do so.

6. The court below erred in not holding that the adjournment intended by the Constitution was such an adjournment as would preclude all reasonable possibility of the return of the bill.

7. The court below erred in holding, in effect, that every adjournment of the Congress, whether temporary or final, would render it impossible for the President to return a bill with his objections.

8. The court below erred in not giving due consideration to the formal protests against the Presidential use of the "pocket veto" by the Judiciary Committees of the House and Senate.

9. The court below erred in the absence of decisions by this or other Federal courts in not giving due considera-

tion to the construction of identical or similar language in State constitutions by the highest courts of such States.

10. The court below erred in adopting a construction of the provision in conflict with and in derrogation of the right of Congress to adjourn and to pass this legislation, notwithstanding the Presidential "pocket veto."

11. The court below erred in holding that the adjournment of the First Session of the Congress prevented, that is, rendered impossible, the return of the bill by the President with his objections.

ARGUMENT

The question here is whether by the adjournment of the First Session of the 69th Congress the President was so prevented from returning the bill with his objections to the House in which it originated that said bill failed to become a law under the provisions of the last paragraph of Article 1, Section VII, Clause 2 of the Constitution of the United States, which reads as follows:

> "If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law."

It is respectfully submitted that the writ herein prayed for should be granted for the following reasons:

1. The question here involved is of great public interest and far-reaching importance.

The dignity and public importance of this question are of the highest character, as it relates to the exercise of functions bestowed by the Constitution upon the Legislative and Executive branches of our government, which are of the gravest importance to the people of the whole country. The enjoyment of our right to life, liberty and the pursuit of happiness is circumscribed and regulated by the laws passed by Congress. Consequently, any question growing

out of a conflict of authority between the President and the Congress, in regard to the enactment of a law, is of such great public importance as to fully justify the consideration of this Honorable Court.

For this reason, it is submitted that the petition should be granted.

2. This Court has not heretofore construed the words "by their adjournment prevent its return," in Article 1, Section VII, Clause 2 of the Constitution of the United States, and it is, therefore, still an open question before this Court as to whether the word "adjournment" therein refers to a final adjournment of the Congress; the adjournment of a session of the Congress, or to the adjournment of the Congress from day to day, or for longer periods, during a session.

The proper interpretation of the word "adjournment" in the language of the Constitution just quoted is of the greatest importance for the guidance of both the Congress and the President, in the consideration and adoption of our Federal laws, and it is respectfully suggested that it would therefore seem to be the constitutional prerogative of this Honorable Court to finally construe and define this word as so used in our Constitution.

For this reason, it is submitted that the petition should be granted.

3. This Court has not heretofore construed the words "by their adjournment prevent its return," in Article 1, Section VII, Clause 2 of the Constitution of the United States, and it is still, therefore, an open question before this Court as to whether the *sine die* "adjournment" of "the Congress," or the adjournment of a session or sitting thereof, or from day to day, or for a longer period of time during a session, "prevents" the return of a bill with the President's objections to the Congress under the quoted language of the Constitution.

It is of equal importance to the Congress and the President that they should have the benefit of the opinion of this

Honorable Court as to what particular character of adjournment of Congress, within the meaning of the constitutional language, will prevent the return by the President, with his objections, of a bill which has been duly passed.

The question here presented is, therefore, of great public importance and, for this reason, it is submitted that the petition should be granted.

4. This Court has not heretofore construed the words "10 days" as used in said quoted clause and it is still, therefore, an open question whether the "10 days" under contemplation are ten consecutive or legislative days (Sundays excepted). Therefore, this Court has not determined whether the return must be made within 10 calendar days and during a recess of the active legislative sittings of the Congress, or may be made within 10 legislative days and when the Congress has again resumed its active legislative sittings after the adjournment.

Great uncertainty has prevailed as to whether the 10 days (Sundays excepted) within which the President must return a bill with his objections, as provided by the language of the Constitution here in question, refers to calendar days or legislative days, and the opinion of this Honorable Court in construing this language will be of great assistance to both the Congress and the President in considering new legislation.

The question is, therefore, of great public importance and, for this reason, it is submitted the petition should be granted.

5. It would appear to be the constitutional duty of the President to afford Congress an opportunity to consider his objections to all bills passed by it, if possible for him to do so, before the final adjournment of any particular Congress, for the reason that Article 1, Section 1, of the Constitution has vested Congress with the exclusive power of legislation, and the President did not give Congress an opportunity to consider his objections to the legislation here in question, although this Congress did not terminate until March 4, 1927, and was in legislative session

for several months prior thereto, and the officers of both Houses thereof continued to perform their duties until said date, notwithstanding that the first legislative session of the Congress ended on July 3, 1926, by adjournment for summer recess.

It appears to be conceded that the Constitution vested the President with advisory power only, in regard to pending legislation. In his messages to Congress, he recommends such legislation as he thinks should be enacted for the best interests of the people of the country. When a bill is passed by both Houses of Congress, the Constitution requires that it be presented to the President for his consideration before becoming a law. If he agrees that the bill should become a law, the Constitution provides that he shall either sign it or allow it to become a law without his signature. If he does not approve such a bill, the purpose and policy of the Constitution seems to be that he shall return it with his objections, so that Congress may be advised of the reasons on account of which he regards the bill as objectionable and have the opportunity to concur with him or pass it over his objections.

In the light of this purpose and policy, it would appear to be the constitutional duty of the President to afford Congress an opportunity to consider his objections to any bill passed by it, if reasonably possible for him to do so before the final adjournment of the Congress so passing the bill. This seems to be in entire accord with the spirit and intention of Article 1, Section 1, of the Constitution, which vests Congress with exclusive power to legislate. The President did not give the Congress any opportunity to consider his objections to the legislation here in question, although this Congress continued until March 4, 1927, and was in legislative session for some three months prior thereto, while duly authorized representatives of the Senate continued in their places, ready to act during every business day until March 4, 1927.

Rule 32 of the Standing Rules of the Senate provides that:

"At the second or any subsequent session of a Congress the legislative business of the Senate which remained undetermined at the close of the next preceding session of that Congress shall be resumed and proceeded with in the same manner as if no adjournment of the Senate had taken place."

This rule clearly indicates that in the mind of the Senate such an adjournment as the one herein referred to did not in any way change the status of pending legislative matters, and the rule would seem to be sufficiently broad to include any bill which might have been presented to the President and returned by him with his objections for reconsideration.

In view of the foregoing, it would therefore appear that the President was not prevented from returning the bill referred to with his objections by the adjournment of the session which passed it and, therefore, for this reason, it is submitted that the petition should be granted.

6. The action of the President in the case at bar appears to be in conflict with the exercise by Congress, and to deprive Congress of its exclusive right to legislate under Article 1, Section 1, of the Constitution, as his action, if valid, amounts to an absolute veto by him of the legislation here in question, while this Congress was still in actual existence as a legislative body, and deprives the Congress of its constitutional right to repass the identical legislation by a two-thirds vote and thus make it a law notwithstanding the Executive objections.

The action of the President in this case seems to amount to an unwarranted interference with the exclusive power of Congress to legislate under Article 1, Section 1, of the Constitution, as it prevented the Congress from exercising its constitutional right under Article 1, Section VII, Clause 2, first paragraph, to consider his objection to this legislation and in its discretion to pass it over his objections by a two-thirds vote. This action on his part, if valid, constituted an absolute prohibition against this particular bill, which it is submitted is a power the makers of the Constitution did not intend to confer upon the President.

For this reason, therefore, it is submitted that the petition should be granted.

7. Because the question here involved necessitates the final determination of the line of demarkation between the Executive and Legislative branches of the government, as to the extent of the right of the Executive to negative any legislation, and the right of the Congress to reconsider legislation objected to by the Executive, it is believed that the case at bar should be determined by this Court as the Court of last resort.

The decision of this case must necessarily determine the line of demarkation between the power of Congress to legislate and the power of the President to negative such legislation.

The dignity and importance of the question involved in this case would seem to require its decision by the highest court of the land.

For this reason, therefore, it is submitted that the petition should be granted.

8. In view of the fact that Judiciary Committees of both Senate and House have at different times disagreed with the construction given this part of Article 1, Section VII, Clause 2, by some of the Presidents and their legal advisors, and that the highest courts of several of the States have construed identical or similar language in their State constitutions directly contrary to the construction sought to be reviewed, it is considered of the utmost importance that this provision should be construed by this Honorable Court.

The Judiciary Committees of the Senate and House, which are the legal advisors of these bodies, have at different times disagreed with the practical construction given to this part of Article 1, Section VII, Clause 2, of the Constitution, by some of the Presidents. While there appear to be no decisions of Federal courts on this question, except that herein sought to be reviewed, nevertheless the highest courts of several of the States have construed iden-

tical or similar language of the State constitutions directly contrary to the construction of the lower Court.

While these differences in construction do not constitute conflicting decisions by Federal courts, nevertheless, considering the quasi-judicial character of the opinions of the Judiciary Committees of the Senate and House, and the construction of identical or similar language by the highest courts of several of the States, when taken in connection with the construction of the constitutional language in question by various Presidents, there would seem to be such a conflict of opinion on this important question as would fully justify the final construction of the language of the Constitution here involved by this Honorable Court.

For this reason, therefore, it is submitted that the petition should be granted.

9. Because of the far-reaching importance of any judicial construction of the Constitution, it is believed that every question involving such construction should be finally determined by this Honorable Court as a Court of final resort thereon.

It is believed no argument is necessary to support this proposition and, for this reason also, it is submitted that the petition should be granted.

CONCLUSION.

In consideration of the views of this Honorable Court, concerning the issuance of writs of certiorari, as discussed in its opinions in—

Forsyth v. *Hammond* (166 U. S. 506; 41 L. ed. 1095)
Fields v. *United States* (205 U. S. 292; 51 L. ed. 807)
Hamilton Brown Shoe Co. v. *Wolf Bros. Co.* (240 U. S. 251; 60 L. ed. 629)
Magnum Import Company v. *Coty* (262 U. S. 159; 67 L. ed. 922)

and in view of the above reasons for allowing the writ, it is respectfully submitted that the petition for writ of certiorari to review the judgment of the court below should be granted.

WILLIAM S. LEWIS,
Attorney for Petitioners.

A. R. SERVEN,
JOHN G. CARTER,
Of Counsel.

Office Supreme Court, U.S.
FILED
FEB 18 1929
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 565

THE OKANOGAN, METHOW, SAN POILS (OR SAN POIL), NESPELEM, COLVILLE, AND LAKE INDIAN TRIBES OR BANDS OF THE STATE OF WASHINGTON,
Petitioners,

vs.

THE UNITED STATES

REPLY FOR PETITIONERS

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Petitioners,

vs.

THE UNITED STATES

BRIEF FOR PETITIONERS

History and Jurisdiction

The opinion below has not been officially reported. Jurisdiction is invoked under Section 3 (b) of Act approved February 13, 1925 (43 Stat. 939). Judgment below April 16, 1928 (R. p. 66). Rehearing denied October 22, 1928 (R. p. 67). Petition for certiorari presented December 4,

1928, and granted January 21, 1929. Jurisdiction sustained by Hamilton Brown Shoe Co. v. Wolf Bros. Co. (240 U. S. 251) and Magnum Import Company v. Coty (262 U. S. 159).

This case arises under Senate Bill 3185, 69th Congress, 1st Session, as an existing law (R. 1.pp. 6-7). This act, entitled "An Act authorizing certain Indian tribes and bands, or any of them, residing in the State of Washington, to present their claims to the Court of Claims," passed by both Houses of Congress, signed by the presiding officers thereof and attested as by law required, was, on June 24, 1926, presented to the President (R. p. 7). Eight days thereafter (Sundays excepted) on July 3, 1926, there was an adjournment of the first session of that Congress for the usual summer recess. December 6, 1926, the same Congress reconvened from recess in second session, and resumed its legislative business. The President did not approve the bill so presented to him; he did not deposit it with the Secretary of State as a law; he did not return the bill with objections to that House where it originated within ten days or at all (R. p. 6). The legislation was simply ignored, or "pocket vetoed."

The Petitioners claimed in the court below that the said jurisdictional act became a law, conferring jurisdiction on the Court of Claims to hear the claims set forth in the petition, by reason of the failure of the Executive to act within the ten days prescribed by the Constitution (Last par., Clause 2, Section 7, Article I U. S. Constitution). Defendant's demurrer challenged the alleged status of the bill as an existing law because the Congress had adjourned for summer recess within said ten days.

The Court below held that the bill was not a law, because of said adjournment, and sustained the demurrer.

Statement of the Case

The present case thus involves an original construction of the Constitution. There are no decisions of a Federal Court directly bearing on the question, except in the case at bar, and there exists a present difference of construction and conflict between the Executive and the Legislative Branches of the Government with respect to the correct interpretation of the language contained in the concluding sentence of the so-called veto provisions of the Constitution. The legal question involved is, therefore, of importance far beyond the present case.

Article I, Section 7, Clause 2, of the Constitution reads as follows:

> "Every bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States; if he approves he shall sign it, but if not he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their Journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall entered on the Journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law."

The Question Involved

It is conceded and obvious that, under the language last quoted, bills presented to the President within ten days of the final adjournment of the Congress do not become laws unless signed by the President, for such final adjournment precludes any further return or reconsideration of the legislation. The question here is: Whether a temporary adjournment of the Congress, other than this final adjournment terminating the legislative existence of the Congress that passed the bill, existing at the expiration of the ten days allotted the President for his consideration thereof, prevents his return of the bill so that it then fails to become a law under the quoted language of the Constitution.

The Precise Question

The precise question therefore is whether the adjournment of the 69th Congress for customary summer recess on July 3, 1926—eight days after the bill, S. 3185, was presented to the President—prevented the President's return of the bill within ten days to the House in which it originated, within the meaning and intent of the language of the exception clause of the Constitution, reading:

"Unless the Congress by their adjournment prevent its return, in which case it shall not be a law."

Attention is directed to the fact that the exception is not adjournment, but prevention of its return by adjournment.

Assignments of Error to be Urged

1. The Court below erred in not giving proper consideration to the purpose, intent, and policy of the makers of

the Constitution, in the light of contemporary history.

2. The court below erred in not giving proper consideration to the particular mischief this language was intended to prevent.

3. The court below erred in so construing the provision as to defeat its evident purpose, when the construction urged by petitioners is equally accordant with its words and sense and would enforce and protect such purpose.

4. The court below erred in not giving proper consideration to the subject, context, and the intention of the makers of the Constitution in construing this provision.

5. The court below erred in not giving due consideration to the obvious implication from the language of the constitutional provision that it was the President's duty to return the bill with his objections, if in any way reasonably possible to do so.

6. The court below erred in not holding that the adjournment intended by the Constitution was such an adjournment as would preclude all reasonable possibility of the return of the bill.

7. The court below erred in holding, in effect, that every adjournment of the Congress, whether temporary or final, would render it impossible for the President to return a bill with his objections.

8. The court below erred in not giving due consideration to the formal protests against the Presidential use of the "pocket veto" by the Judiciary Committees of the House and Senate.

9. The court below erred in the absence of decisions by this or other Federal courts in not giving due consideration to the construction of identical or similar language in State constitutions by the highest courts of such States.

10. The court below erred in adopting a construction of the provision in conflict with and in derrogation of the right

of Congress to adjourn and to pass this legislation, notwithstanding the Presidential "pocket veto."

11. The court below erred in holding that the adjournment of the First Session of the Congress prevented, that is, rendered impossible, the return of the bill by the President, with his objections.

ARGUMENT

Summary

Each Congress is a single entity. Ten day provision may be construed as either ten legislative or calendar days. Distinction between adjournments other than final solely one of duration and nomenclature. Only exception is where return is prevented. When House of origin is in adjournment but the other House is not, return must be made to proper representatives of the House in adjournment. If return can properly be made in that case, it can be properly made in every case before final adjournment of the Congress. President must return bill with objections if possible. Purpose of return provision defeated by pocket veto. Duty and ability of the President to return bill with objections not affected by intermediate adjournments. Return of bill with objections necessary to provide opportunity for reconsideration. State constitutional precedents support petitioner's contention. The lower court held, in effect, that any adjournment may prevent return. If Constitution meant this it would have so stated in plain terms. The lower court held, in effect, that Congress by its adjournment forfeited all right to reconsider, thereby giving the President an absolute veto power wholly contrary to the policy, purpose and intent of the framers of the Constitution and the letter and spirit of that instrument. President's sole power is limited to suggesting revision of legislation.

Executive precedents contrary to policy, spirit and intent of Constitution and in derrogation of other Constitutional powers not compelling authority. Precedents cannot abrogate provisions of the Constitution. Practice of pocket veto outgrowth of mistaken conceptions as to nature of the Congress and character of its sittings. Executive precedents not unanimous. Present asserted right of pocket veto applicable to all adjournments and is contrary to policy, intent, purpose and plain language of the Constitution. The [redacted]ability to return should be held as equivalent to and co-existent with the power of Congress to thereafter legislatively consider the bill and objections thereto. Results of adopting construction of lower court violate the obvious purpose and intent of the Constitution regarding legislation, as conclusively demonstrated by a consideration of the errors assigned.

The Law and the Pertinent Facts

The case as outlined presents but a single problem of constitutional construction. The assignments of error all relate to the proper method, the proper aids, and the proper tests by which correct constitutional construction may be attained, and whereby an incorrect construction may be detected and rejected, and the correct construction confirmed and adopted.

As material considerations to be held in mind in construing the quoted language, and in preliminary argument exhibiting the points of law raised, petitioners here urge:

1. **Each Congress is a single entity and its sessions have one practical unity.**

The difference between a recess over a holiday, and longer recess by the adjournment between so-called ses-

sions of the same Congress, is one of nomenclature and duration and not of substance, for there is no change in the status of legislative business. Bills referred to conference at one session can be reported to Congress at the next, and even where one House asks for a conference at one session, the other House can agree to it at the next session with no further action by the other branch. Finally, bills enrolled and signed by the presiding officers of the two Houses at the close of a session have been sent to the President and approved at the beginning of the next session. (See also Constitution, Jefferson's Manual and Rules of the House of Representatives, 69th Congress, Second Session, p. 401)

The following rules and practices of the House which originated in 1818 are illustrative of the single entity and unity of the two sessions of the Congress:

The Journal of a day of the previous session may even be amended at a succeeding session of the Congress. (Hind's Precedents, Vol. IV., Sec. 2744.) A motion to reconsider when once entered may remain pending indefinitely, even until a succeeding session of the same Congress. (Id. Vol. V., Sec. 5684.)

One House having asked for a conference at one session, the other House may agree to the conference at the next session of the Congress. (Id. Vol. V., Sec. 6286.)

The power of a conference committee of one session, that has not reported, does not expire by reason of the termination of a session, unless it be the last session. (Id. Vol. V., Secs. 6260-6262.)

Enrolled bills pending at the close of a session were at the next session of the same Congress ordered to be treated as if no adjournment had taken place. (Id. Vol. IV., Secs. 3487-3488.)

Bills enrolled and signed by the presiding officers of the two Houses of one session have been sent to the President and approved at the next session. (Id. Vol. IV., Sec. 3486.) As early as 1818 the House authorized an investigating committee to continue and report at the next session of the Congress. (1st Session, 15th Congress, Journal p. 447.)

A committee empowered to sit during recess was directed to file its report with the Clerk of the House. (Hind's Precedents, Vol. III., Sec. 1741.)

Committees are empowered to sit during a recess, that is, within the term of the Congress. (Id. Vol. III., Sec. 1741.)

Joint Committees of the two Houses have been authorized to sit during recess of the Congress. (Id. Vol. III., Secs. 1763-1764.)

A message from the President, being presented in the closing hours of a session, it was read at the beginning of the next session of the same Congress. (Id. Vol. V., Sec. 6646.)

A vetoed bill not acted on before adjournment of a session was acted on at the next session of the Congress. (Id. Vol. IV., Sec. 3522.)

Such being the nature of "the Congress," each House thereof is still a House and a body, although it does not sit every moment of the time; when not in active session, each House of "the Congress" has presiding and recording officers (President and Secretary or Speaker and Clerk) who, for all purposes with which the laws may clothe them, represent their respective bodies in an executive and ministerial capacity. Now, though that House in which the bill originated may not be actually sitting in its Chamber at all times during the

two years, yet that House and "the Congress," of which it is a part, is in existence from the time it first meets and organizes until *sine die* adjournment, not of a session, but of the Congress.

2. **The ten days for the consideration and return of the bill may be construed as ten "legislative" days, and under such construction return may be made when the Congress resumes active legislative sittings after adjournment.**

The ten day limitation in the quoted clause of the Constitution, within which the President is required to approve or return bills, is susceptible of two constructions; i.e., ten calendar days after presentation of the bill, including in this case the ninth and tenth days which fall in recess during the adjournment of the active legislative session of "the Congress"; or, ten legislative days—that is, ten days during all of which "the Congress" is in active legislative session, which, in this case, would include the first two days of the second session.

Contemporary judicial construction of the similar words, as used in the Massachusetts constitution, from which the Federal provision was drafted, is found in the Opinion of the Justices, 3 Mass., 567 (1791), holding that this language refers to days of active legislative sittings:

> "If such bill or resolve lays more than five days before the adjournment, and so many days of the court's sitting upon the adjournment, as will make up the full term of five days, without the governor's returning the same, with his reasons for not approving it, we conceive such bill or resolve has the

force of law; for all the days of the court's sitting are but one session, although an adjournment intervenes."

This decision is of further interest and value in this case, for the reason that the Massachusetts constitution of 1780, which furnished the model for the main veto provision of the Federal Constitution, contained no final exception clause, and the effect of any adjournment of the legislative body (General Council) during the period allotted to the Executive for his revisionary consideration of its bills, upon the final legal status of such enactments, had not been declared by the instrument or announced by the courts of the Commonwealth. This decision is a contemporary judicial announcement of practically the same thought as that which the Constitutional Convention incorporated into the final exception clause of the Constitution: "Unless the Congress by their adjournment prevent its return, in which case it shall not be a law," and holds in effect that where there is a subsequent meeting of the same legislative body after the adjournment the Executive must return the legislation within ten legislative days or it becomes a law through his inaction.

When a bill is presented to the President for his consideration, it is the clear intent of the Constitution that it is his duty either to permit the bill to become a law or return it with his objections, in order that the Congress may exercise its right to be advised thereof and have the opportunity to fully consider them. If in its wisdom the bill should become a law, notwithstanding such objections, Congress may then repass it by a two-thirds vote. In this way only can both the Congress and the President be held responsible, as the Constitution

evidently intended, for the performance of their duties in respect to legislation while that Congress still exists.

The following authorities construe the limitation on the executive's time, in which to exercise revision over legislation under state constitutions, to mean, not calendar days, but legislative days, during each one of which the legislature is in active session; and, in case of recess, the governor is given sufficient additional days after the reassembling of the legislature, in which to return bills, to make up the full quota of constitutional days during all of which the legislature is in active session. State v. Joseph (1911) 175 Ala. 579, 57 So. Rep. 942; State v. Norwalk (1904) 77 Conn. 258, 58 Atlantic Rep. 759.

Under such a construction the President could have returned the bill to "the Congress" when it reassembled on December 6, 1926. This was not done, and the bill here under consideration is claimed to be a law through the inaction of the President under either construction of the term "ten days."

3. The final adjournment of the Congress may be a voluntary adjournment prior to March 3 of odd numbered years.

It should be noted that the time of meeting, the times of adjournment, the days and hours of its active legislative sittings are all left to the Congress by the Constitution. The short session, ending on March 4th of the odd numbered years, is merely a temporary accident of the calendar, which all Congresses have had the power to alter by fixing a different and earlier date on which to annually convene. The framers of the Constitution, by fixing the date for the assembling of the

first Congress on the first Monday in December, merely fixed a tentative date for the meeting of subsequent Congresses; and this provision and that requiring Congress to assemble annually were inserted into the instrument without intent or purpose to affect in any manner the previously conceived legislative provisions of that instrument, or the precise powers and functions expressly conferred upon the Congress and the Executive with respect to the enactment of laws.

Under the Constitution, and within the reasonable contemplation of those who framed and adopted that instrument, the Congress, should it so choose, may by enactment convene annually on the first Monday of March instead of December, in each year, and may adjourn *sine die* and finally dissolve at any date the two Houses may fix prior to March 3rd of odd numbered years. Hence, under the Constitution, the final adjournment of the Congress may be a voluntary action on its part, rather than the date of the expiration of the tenure of its members.

4. The distinction between all adjournments of the Congress (other than final adjournment) is one of duration and nomenclature only.

After adjournment for the remainder of the day, or for a day, or for a longer period as for the Christmas recess, or for the summer recess between two sessions of the same Congress, the Congress resumes its business precisely where left off, without any difference occasioned by duration of the recess.

Each separate Congress may also remain in continual legislative session, or have regular monthly, semiannual or annual sessions, with intervening recess, with-

out constitutional restriction or in any way affecting the exercise of its legislative functions or the duty of the Executive to return its legislation, or permit it to become law at the expiration of the allotted ten days, if it is possible for the Executive to divest himself of the control of the bill and place it, with his objections, again within the control of the Congress within the prescribed time.

During temporary adjournment each House has officers who represent it in purely clerical and administrative capacities. From the time of their organization until final adjournment, such officers, in all purely clerical and administrative capacities, represent their respective Houses during suspension of active legislative sittings, whether for the remainder of the day or for the summer recess, and can act for it in the reception, recording, filing and custody of its returned bills and accompanying objections which the President would return within any portion of the ten days falling in recess of active legislative sessions of "that House."

5. **The exception is not unless the Congress adjourn, or unless that House adjourn within the allotted ten days; the exception is "unless the Congress prevent its return by their adjournment."**

"The Congress" is here used in precisely the same sense as the words "the legislature" used in the preliminary draft of the Constitution, as reported by the Committee on Detail on August 6, 1787, and for which it was substituted in the final draft reported on September 12, 1787, by the Committee on Style. The apparent intent of those who framed the Constitution was that the Congress, with

respect to the operation of the veto provisions drafted from the existing models of the Massachusetts and New York constitutions, should be considered in precisely the same character as the state legislatures. The modifying possessive adjective and verb are both in the plural, indicating careful diction, coordinate thought and clear intent that "the Congress" shall, as used, be understood in the plural sense as denoting the concurrent adjournment of the two Houses of the national legislature.

The word "adjournment," in contemporary and in present day meaning as respects sittings of the legislative body, is an indefinite term, meaning either the putting off until another day, or time specified or without day; that is, the closing of some session of a public or official body. The word had not then, and has not now the exclusive meaning that attaches to the word "prorogation" as used to designate the termination of a particular parliament.

The exception is not unless "the Congress" adjourn. The exception is, unless the Congress by their adjournment prevent its return, and it is the character of the adjournment and its effect upon the revisionary purpose of the veto provision, in preventing a return of the bill and a reconsideration thereof with the President's objections, that is meant to constitute the single exception when bills, not returned in ten days fail to become laws.

If all adjournments of the Congress (temporary, interim session, and *sine die*) in contemplation of the framers of the Constitution had the effect of preventing the return of the bill with veto objections, then their economy of language and clearness of diction would have demanded and assured an exception clause predicated entirely on adjournment and reading somewhat as follows: Unless the Congress suspend or adjourn its active legislative sessions within said time, in which case it shall not be a law. Any

such provision would have been in plain derrogation of the express right of the Congress and of the Houses thereof to adjournments during their legislative existence.

In the absense of such language, consideration must be here given to the idea of an adjournment—not all adjournments—but one that will "prevent its return." Effect is to be given, if possible, to each section, clause and word, and no word is to be rejected or discarded which may have a material bearing on the rights and powers granted, and if the language of any part be doubtful, it must be interpreted by every fair intendment to harmonize with the main purpose and not to defeat it. The presumption is that a definite meaning attaches to each word and where the words employed, taken in their ordinary sense and in their grammatical arrangement, embody a definite meaning which involves no conflict with other parts of the Constitution, the meaning thus apparent on its face must be adopted, and it is not within the province of the Court to speculate otherwise as to the purpose of the framers. (Story on the Constitution, Vol. I, Sec. 400.)

The only adjournment that will prevent the return of the bill with the President's objections, within the fair meaning and intent of the veto provision and the quoted exception clause, is such adjournment as wholly defeats the revisionary intent and purpose of the veto clause.

The language of the New York Constitution (1777), which was the model for the exception clause, reads: "Unless the legislature shall, by their adjournment, render a return of the bill within ten days impracticable," and the idea of those who framed and adopted the Federal Constitution was clearly such an adjournment as made any return of the bill for revision impracticable and wholly futile. The Supreme Court of Massachusetts in a decision announced May 9, 1791, practically contemporary with the

adoption of the Constitution, in answering the question as to the effect of adjournments of the General Council of that State on its bills in the hands of the Governor, in 3 Mass. 567, in The Opinion of the Justices, said: "If there is no subsequent meeting of the same general court on the adjournment, we are clearly of the opinion that such bill or resolve has not the force of law," thereby holding in effect that a final adjournment, even without an exception clause prevents an unreturned bill from becoming a law, but also holding other adjournments do not prevent unreturned bills from becoming a law under the constitutional limitation for their return.

6. Adjournment of "that House" is not an adjournment of the Congress, and is not within the exception of the quoted language.

Under the construction ten "calendar" days, Sundays excepted, the exception is yet "unless the Congress by their adjournment prevent its return," and return must be made to "that House," though it alone may be temporarily adjourned for the remainder of the day, or a longer period, the Congress being yet in active legislative session and unadjourned. While return is to be made to a particular House; the adjournment referred to is not the adjournment of a particular House; it is an adjournment of "the Congress"—the whole law making and legislative power of the Country.

The language of the exception clause is plural, and not in the singular or alternative as respects to the two separate Houses comprising "the Congress" which are not mentioned. The prevention of "return" by adjournment is therefore restricted to a prevention of a return occasioned solely by adjournment of "the Con-

gress"—that is a joint and concurrent adjournment of both Houses which comprise the Congress. One House alone is not "the Congress," and a separate recess of but one House alone, taken by that House in which the bill originated, is not within the plain meaning or strict construction of the language of this clause. Consequently, recess or temporary adjournment of "that House" alone, will not operate under the language of this clause to relieve the Executive from the discharge of his revisionary duties as to bills passed by it and theretofore presented to him; or in any way mitigate against the operation of the ten day rule declaring all bills to be laws at the expiration of ten days in the absence of such return.

Hence, though "that House" adjourns for three hours, three days or three months, on the tenth day, and the bill is to be returned to "that House" on that day, such adjournment is not an adjournment of "the Congress."

The Executive must return the bill during the last three hours of the tenth day, although "that House" is not sitting, the Congress being yet in session. If he cannot, it is equivalent to saying that he is bound to return the bill in nine days and twenty-one hours, or in seven days, or any lessor period to which the time to make return is limited by a recess taken by "that House," and if he fail to make a return the bill becomes a law within ten days despite his objections, though, perhaps, it was only passed by one majority.

An adjournment by "that House" for the remainder of the tenth day (taken before the President has completed his veto message and can return the bill to that House in session), not coming within the language of the exception clause and "the Congress" being still in

existence, then the bill must be constructively returned to that House, during its temporary recess, by delivery to the presiding or recording officers thereof during the remainder of the tenth day, else the bill becomes a law. The next day, the eleventh, is too late.

If the President within ten days may communicate with "that House" while its active legislative operations are in a state of suspense from one day to another, or from one day to two or three, or from three days to three months (were such a case possible), by returning and depositing the papers that the Constitution gives him the right to return within the ten days, with the responsible officers of "that House," whom it has chosen, all that is required of such officers is that they receive and care for the same in like manner as the other records of "that House," to be taken up with its other unfinished business when that House again resumes its active legislative sittings.

Clearly the adjournment that will prevent a return is limited by the language of the Constitution to an adjournment of the Congress, not of "that House" thereof.

7. The President's power and duty with respect to the return; the bill must be returned, if return can be made.

The declared purpose, and the clear intent and policy of the framers of the Constitution was to place the legislative power of the government solely in the hands of the Congress. The Executive, under the veto provisions, was simply made an instrumentality for the revision of hasty or ill-considered enactments. If he approved, he signed, and the bill forthwith became a law; if he failed to act, the bill became a law after lying in

his possession ten days. If he had objections, or suggested revision, by the return of the bill in ten days the same remained in the nature of unfinished business of the Congress until reconsidered and was either passed over the objections by the vote of two-thirds of each House, or failed to pass. The only exception is where the President would return the legislation and "the Congress, by their adjournment, prevent its return, in which case it shall not be a law."

There are no constitutional requirements either that this revisionary or veto power be exercised only during the hours and days of the active legislative sittings of the Congress, or that the bill be returned to "that House" only during the active legislative session of the Congress, or that the returned bill and veto must be received and acted upon during the same session of the Congress at which the bill was passed. The Constitution having imposed no such restrictions on the exercise of these constitutional powers, neither the President nor the Courts have power to impose such restrictions on the free exercise of these constitutional rights and powers by either the Executive or Congress. The sole exception is where "the Congress, by their adjournment, prevent its return." It was never the intention that the President's inaction should in any way defeat such legislation. It was to guard against that very abuse that the ten day clause was inserted, and the single exception is limited to an act of the Congress itself defeating the revisionary purpose of the whole veto clause and any return of the bill and objections by a final adjournment of the Congress within the allotted ten days. The effect is to leave the bill not a law, but as unfinished business which dies with the final adjournment of the Congress.

The constitutional right of the Congress, vested with sole legislative power to have its enactments become laws, is not to be lightly considered or unnecessarily denied. The President's duty to act is not affected by his illness, his incapacity, his absence, or press of executive duties, or consideration of more important legislation; nor by the intervention and urgency of mighty affairs of state; nor even by the exigencies of internecine war, or any other causes that may involve the very existence of the government. He must act and make return of the bill and objections in ten days, unless the Congress "by their adjournment prevent its return."

No act or situation of the President can prevent the bill becoming a law, if unreturned in ten days; no other obstacles imposed by the Congress, and no other act of the Congress or of "that House" in refusing to accept or in impeding such return can prevent the bill becoming a law in ten days if unreturned by the President; again the sole exception is where the Congress "by their adjournment" prevent such return.

In the light of this policy and this purpose, it appears to be the constitutional duty of the President to afford the Congress an opportunity to again receive and control its legislation before the end of ten days; to permit Congress to consider his objections to any bill passed by it; and to re-pass or reject the bill in final legislation thereon, if reasonably possible for him to do so before the final adjournment of the Congress so passing the bill.

8. The object and purpose of the return of the bill wholly defeated by "Pocket Veto."

It was the intention of those who framed and adopted the Constitution that all Presidential vetoes should include

the reasons for the refusal to sign, and if the President fails to approve a bill he is required, by the pain language of the instrument, "to return it with his objections." The sole object and purpose of this return of the bill is to again place the legislation before the Congress for reconsideration, with the objections, in fulfillment of the revisionary intent and purpose of the veto clause. This object and purpose may reasonably be accomplished so long as the Congress continue to exist as a legislative body capable of reconsidering the bill and of passing upon the President's objections. Such action by Congress may be taken at any time before final adjournment.

Any construction of the quoted exception clause that permits the Executive to withhold the legislation of an existing and continuing Congress beyond the specified ten days limit and to finally dispose of such legislation by the simple expedient of placing it in an Executive pigeon hole, and subjecting it to a so-called "pocket veto," in no way serves the purpose nor carries out the revisionary intent of the whole veto clause. Such construction not only prevents all revision, but confers on the Executive an absolute veto power. It would also appear to be a serious and unwarranted infringement on other rights of the Congress and to deprive the Congress of their exclusive right to legislate as to the particular bill, and be advised of the President's objections thereto.

9. Duty and ability to return bill to "that House" not changed by a concurrent recess of the Congress.

Granting that the exception clause applies only to a prevention of return caused by adjournment of the Congress, and that return must be made to "that House," it

alone having temporarily adjourned during the ten days allotted the President for consideration of its bills; then there is no conceivable way in which the President's duty or ability to make such return to "that House" in recess is in any way altered or affected by the concurrent temporary recess of the other House constituting the Congress, where the adjournments are temporary and both Houses of the Congress later reassemble and sit after the adjournment and resume their interrupted legislative programs.

If return may be made to "that House" during its temporary recess, then the same return may be made and the whole object and purpose of "the return" may still be accomplished though "the Congress" be in adjournment for a day, or over a holiday, or over the Christmas Holidays, or for the summer recess. Temporary recess and suspension of active legislative sittings of the Congress, before the expiration of the ten days, can thus neither prevent a return nor defeat the intent and purpose of the veto provision, where return may be made in ten days to "that House" in its temporary recess. The bill and objections may be considered and acted upon by "the Congress" when again sitting after the adjournment, and before the final adjournment that dissolves the particular Congress that passed the bill. Within the spirit and intent of the instrument, inability to make return, on account of adjournment of the Congress, should be co-existent with inability of the Congress thereafter to consider the objections. The revisionary purpose of the general veto provision may be fully accomplished, despite the fact that the Congress is in temporary recess at the time of the required return.

10. **The return of the bill is simply the act of the President in divesting himself of further custody and control of the bill and replacing it, with**

his objections, in the actual or constructive control of the Congress.

The presentation of bills to the President and his return of the same for revision are simply a process in legislative procedure like the handling of bills in committee, or in conference, or by the separate Houses. It is not necessary that each House be actually sitting in active legislative session during every hour or day that the other House sits, or while its committees function, or while the Executive considers its legislation. The presentation of bills to the President, his consideration thereof and his return thereof, may reasonably be accomplished during hours and days when the Houses of the Congress are not actually sitting in their respective Houses in active legislative session without violation of the spirit or language of the Constitution. In event that the Congress has adjourned either for the remainder of the day, or for the summer recess, then by a reasonable construction the President may, on the tenth day allotted to him, make return of the bill to "that House" of the Congress which will again resume its active legislative sittings the following day, or the following December, according to the length of the adjournment, by the delivery of the bill and veto message to the recognized officers of that House, who, for all legal intents and purposes, represent and act for that House in a purely clerical and ministerial capacity during the hours and days when "that House" or the Congress is not in active legislative session.

A concession that the exception clause does not apply to adjournment of "that House" alone, the Congress being yet in session, and that, in such case, return must yet be made to "that House" in its temporary recess for the remainder of the day, or for several days, as the case may be, is a concession that a like return may be made to "that House"

wherein the bill originated, during the concurrent adjournment of the other House or of the Congress; and is a concession that the only adjournment which can prevent the President's return of the bill is the final adjournment of the Congress.

The Constitution seldom goes into details as to the precise manner in which a constitutional duty shall be performed, leaving it to reasonable discretion and judgment how the precise act shall be performed, and under practical construction all that would seem to be required of the President is that during temporary recess of "that House" he make the best return that the circumstances permit within the ten days, and that this requirement for the return may be fully satisfied by return and delivery of the bill and objections to a responsible officer of "that House," vested and clothed with the care and custody of its records and bills. Such return again accords the Congress, vested with sole legislative power, full potential power and control over the legislation that the President does not approve of and does not desire to become a law under the ten day clause. U. S. v. Allen, 36 Fed., Rep. pp. 174-6, is authority that a return to and receipt by a journal clerk of the House is a sufficient return. In actual practice bills are often presented to the President by delivery to his secretary or executive clerk, who receipts for the same on behalf of the President. No one has ever questioned the validity of such presentation. In this case a return of the bill, and any objections, by delivery of the same on July 5, 1926, to the President, the Secretary, or the journal clerk of the Senate would have been all that was reasonably required under the Constitution, and no one could have properly questioned the legality or effectiveness of such return as a full compliance with the requirement in like manner as if the return had been made at the precise hour when that House had adjourned its sittings for the day.

II. THE AUTHORITIES

There are no decisions of a Federal Court on the precise question now before this Court except that here on review. The courts of last resort of several states, where the same question of construction has been raised as to similar or identical language in State constitutions, have been unanimous in holding that the adjournment contemplated in the quoted clause of the Constitution is a final adjournment. These authorities were presented to the lower court (Opinion R. p. 6, Line 38), referred to as "supposed to bear upon or decide similar questions," but not otherwise considered. It is petitioner's contention that these authorities pass upon and decide the identical question now before the Court, and that they are, in the absence of Federal decisions, peculiarly pertinent and applicable as aids in the construction of the quoted clause of the Federal Constitution because its veto provisons were drawn from and modeled on the then existing constitutions of Massachusetts and New York. The Opinion of the Justices, 3 Mass. 567, referred to above, was a decision practically contemporary with the adoption of the Constitution. These authorities in order of their announcement are as follows:

1791 Opinion of Justices, 3 Mass. 567.
1864 Soldiers Voting Bill, 45 N. H. 607.
1870 Harpending v. Height, 39 Calif. 189.
1875 Corwin v. Comptroller, 6 So. Car. 390.
1881 Miller v. Murford, 11 Nebr. 377.
1882 Wolfe v. McCaull, 76 Va. 876.
1886 Heyquembourgh v. Dunkirk, 49 Hun. (N. Y.) 550.
1912 State v. Joseph, 175 Ala. 579.
1913 Tuttle v. Boston, 215 Mass. 57.
1916 Johnson City v. Electric Co., 133 Tenn. 637.

III. THE OPINION AND DECISION OF THE LOWER COURT DISCUSSED

The construction urged by defendant and adopted by the lower court is to the effect that the quoted language of the exception clause means unless the Congress adjourn, and that any adjournment of the Congress existing at the expiration of the allotted ten days *ipso facto* prevents an unreturned bill from becoming a law.

This construction is based, and necessarily based, on the assumption that there is an implication in the Constitution that the President can only return a bill to "that House" while the Congress is in active legislative session; and that if the Congress be not in active legislative session, but in temporary adjournment, on the last day or even the last hour of the full ten days allotted to the President for the consideration and return of bills, such bills fail to become laws by reason of the mere existence of such adjournment.

The Court (Opinion R. p. 65, line 15) says that "the Constitution does not limit the time of adjournment to the final adjournment of the second session and the courts have no right to so limit it." Our answer is that the Constitution has not made the exception, when bills unreturned in ten days fail to become laws, simply an adjournment of the Congress occurring or existing at the expiration of the allotted ten days; the exception in plain language is: "Unless the Congress by their adjournment prevent its return." Had those who framed the Constitution intended the construction announced by the lower court they would have said so in plain words; what they have said is that the sole occasion when bills presented to the President fail to become laws in ten days is where such return is prevented, and

the sole excepted cause of prevention is prevention occasioned by the adjournment of the Congress.

The opinion and decision of the court wholly fails to consider the object and purpose of the return, or the possible effect of any existing adjournment of the Congress to interfere with or prevent the President's attempt to divest himself of further control over the bill, and to restore it to the actual or potential possession of the House wherein it originated; or to affect or defeat the revisionary purpose of such return. The court in effect held that the constitutional right of the Congress either to have its legislation returned to it, or to have it become a law through the President's inaction, is forfeited by the mere exercise of such right to recess during all or a part of the ten days allotted the President to consider its bills; that the exercise of right to recess is also in conflict with and its enjoyment further conditioned on a forfeiture of the right to receive and know the President's specific objections to its legislation, and its right to enact such legislation into law by two-thirds vote, notwithstanding any objections the President may have and return therewith.

Such construction gives to the President's silence and inaction the very abuse that the ten-day clause was inserted to correct—greater power than to his expressed objections, returned to the Congress with the bill. This construction not only wholly defeats the purpose of the particular clause to which it refers, but in effect gives to the President an absolute veto power which was clearly denied him by the Constitution. Absolute veto power, based upon the return of a bill, is wholly unknown under any constitution, State or Federal, under which we live, and such a veto can under no circumstances be upheld without doing violence to both the

letter and the spirit of the Constitution. No absolute veto should be upheld, based upon failure to return a bill during the legislative existence of the Congress.

The lower court apparently gave scant, if any, consideration to the policy, purpose and intent of the whole veto clause, or even to the exact wording and precise meaning of the quoted clause under consideration by it, the major idea embodied in which is a prevention of return. Even this exception of prevented return is limited to a single cause—prevention by adjournment of the Congress. The sole purpose of the veto is suggested revision; the sole power to pass on suggestions for revision or to revise the legislation is in the Congress; the sole purpose of the return is to restore the legislation to the Congress for reconsideration; and the only way in which intended legislative action on the return, contemplated under the Constitution, can be prevented is by the final adjournment of the Congress. The lower court gave no consideration to the effect and obvious results following its construction, which are so in conflict with reasonable interpretation of the policy and purpose of the instrument and the mischief this clause was designed to prevent as to require the rejection of the construction for one more in harmony with its language and purpose. The construction presented and insisted on by petitioners is a reasonable and harmonious one.

1. Limited revisionary purpose of the veto clause in the Constitution.

The sole legitimate function of the Executive under the Federal Constitution, as respects legislation passed by the Congress, is to act as an instrument to suggest

revision. The power of legislation is placed solely in the Congress of the United States. The Executive can approve and the legislation becomes a law; but he may not approve, and the legislation becomes a law in ten days notwithstanding his inaction. When the President thinks Congress has not acted wisely, he may state his specific objections and return the legislation to Congress within ten days, but even in this case it is left wholly to the Congress itself (expressly vested with all legislative powers by the Constitution) to determine finally what shall be done with such legislation. The only power conferred on the Executive by the Constitution is that of requiring, by his suggested revision and the return of the bill in ten days, that the Congress which passed it reconsider the particular legislation; and, if they choose to repass it, the Constitution, not the President, requires a two-thirds vote to thus repass it over the Executive's revisionary objections.

The construction adopted by the lower court thus gives no consideration to the purpose, intent and policy of the makers of the Constitution that the will of the Congress should be supreme, and to the limited revisionary purpose of the veto power granted. Such construction deprives the Congress unnecessarily of its exclusive right to legislate; prevents any revision, and clothes the President with an absolute veto, contrary to the will of those who framed and adopted the instrument. The constructions urged by petitioners give reasonable force and effect to their purpose, intent and policy in drafting these clauses. (The Federalist, No. 73; Madison Papers, Langtree and O'Sullivan Edition, 1840, pp. 733, 739, 783-91, 809, 812, 860, 891, 1130, 1161, 1169, 1171, 1189, 1224, 1226, 1231-2, 1248, 1332, 1541, 1543, 1548, 1565, 1570.)

2. Executive precedents involving exercise of and asserted right of pocket veto power contrary to the policy, spirit and intent of the Constitution and in direct derrogation and defeat of other rights and powers conferred thereby, and opposed to the plain language and reasonable meaning of the instrument, are not a first or best guide nor compelling authority for the construction of the language here under consideration.

Under the Constitution it is a primary function of Congress to make the laws, the Judiciary to interpret them and the Executive to administer them. It is for the courts alone to construe the Constitution. In such construction the plain language of the Constitution is the best guide. The language should be construed in accord with the spirit of the time of its adoption and the prevailing sentiment of the people. Precedents (Congressional or Executive) are not a first or best guide for construction, and should be resorted to only as a last resource, all other means of interpretation having failed. There are strong Congressional precedents in favor of petitioner's insistence and if Executive precedents are to be given serious consideration, then equal consideration should be given to contrary precedents of construction by Congress, but neither construction, nor precedents of construction by the Executive or by Congress, override the clear meaning and plain intent of the Constitutional language.

Precedents cannot abrogate the provisions of the Constitution. Contemporary or subsequent construction can never abrogate the text of a constitution; it can never fritter away its obvious sense; it can never narrow down its

true limitations; it can never enlarge its true boundaries. (U. P. R. R. Co. v. U. S. 10 Ct. Cl. Report 548, s. c. in 91 U. S. 72; Story on the Constitution Sec. 407.) Acquiescence or sufferance for any length of time can not legalize a clear usurpation of power, where the people have plainly expressed their will and appointed judicial tribunals to interpret and enforce it. (See Cooley's Constitutional Law, 6th ed. (1890) p. 85.) A claim of power is frequently permitted or yielded to merely because it is claimed, and it may be exercised for a long period of time in absence of any constitutional right or power, and even in violation of constitutional prohibition without special occasion arising for its interpretation by a court, or any one being sufficiently interested in the subject to raise the question, but these circumstances can not be allowed to sanction a clear infraction of the Constitution or the neglect to discharge constitutional duties or the disregard of the clear right of the Congress. (Cooley's Constitutional Law. Id. pp. 85, 86; Pingree v. Auditor, 120 Mich. 95; State v. Weightson, 56 N. J. L. 128; State v. Veacon, 66 Ohio St. 491; Harrison v. Willis, 7 Heisch. (Penn.) 35; McPherson v. Secretary, 92 Mich. 377; Henry v. Cherry, 30 R. I. 13.)

Neither the President nor Congress can by action or precedence, or concurrence therein, alter the plain language or defeat this clear intent and purpose of the Constitution.

Therefore, neither the assertion, or use by the Executive of the "pocket veto," is in any way controlling upon the interpretation of the constitutional provision herein questioned. Had Congress remained entirely silent regarding the matter, such silence can not amount to a controlling acquiescence to defeat the purpose of the constitutional provisions, when the judicial branch of the government alone

has been vested with the power to determine whether or not, under the provisions of the Constitution, a bill so ignored or pocket vetoed has become a law. And this is the precise reason for the case at bar. The effect of Executive action in this regard is entirely comparable to the effect of the action of Executive Officers in making regulations construing acts of Congress. The Supreme Court has frequently held that the Departmental regulations must be kept strictly within the Statute which is the source of their authority and that no Executive Officer can by regulation either enlarge, limit or modify the rights and privileges conferred or duties imposed by the statute to which such regulations relate. (Waite v. Macey 246 U. S. 606; U. S. v. United Verde Copper Co. 196 U. S. 207; Morrill v. Jones 106 U. S. 466; U. S. v. Merriam 263 U. S. 187-8). The same principle is equally applicable to Executive and Congressional action in reference to the construction of the Constitution. Such construction of the Constitution by either the Executive or Congress is material only when clearly within the intent and meaning of that instrument. Therefore, whether the Executive has asserted the right of pocket veto or Congress has or has not so acquiesced in the use of the pocket veto in the past, is entirely immaterial, for the policy, the purpose, the plain language and clear intent of the Constitution is controlling. This requires the Executive to return within ten days all bills objectionable to him, if in any way possible, to the House in which they originated. Under the Constitution, Congress alone has exclusive power to legislate and to determine whether or not a bill shall be a law, notwithstanding any objections of the President thereto. This right, and the capacity of Congress to exercise it, continues as long as the particular Congress exists, and it is terminated only by the dissolution of that Congress by its final adjournment. The legitimate power of the Execu-

tive to obstruct legislation is limited to the return to Congress of such bills as he objects to, with his reasons therefor. The Constitution clearly requires the return of all bills objected to by him with his objections, unless such return is prevented by the adjournment of the Congress. It is, therefore, the character and effect, not the duration of the adjournment, which prevents the return of the bill. Return by the Executive can be prevented only in case the Congress passing such a bill has ceased to exist. During the existence of Congress, there is no time subsequent to its organization when the Executive can not return a bill with his objections, either directly to the House where it originated, in ten legislative days, or to the duly authorized officers and agents thereof in ten calendar days, including a tenth day falling in recess, to be presented by such officers to that House for its consideration at the proper time therefor.

3. Origin and development of the so-called power and practice of "pocket veto."

Executive precedents of asserted inability to exercise revisionary power over or to return legislation presented within ten days of the temporary recess of a Congress, arose from a misconception and misunderstanding of the nature of a Congress, and of the character of its sittings, and of the effect of its temporary adjournments. They were originally based on the following mistaken conceptions:

1. That the exception, when unreturned bills do not become laws, was when Congress was in temporary or other adjournment at the expiration of the allotted ten days.

2. That the Executive's function in revision of bills could only be exercised during hours and days when the Congress was in active legislative session.
3. That the adjournment of a first or intermediate session of the same Congress was analogous, in effect, to the prorogation terminating a particular Parliament.
4. That the several sessions of a Congress were separate and distinct legislative entities, each terminating all legislative work of the Congress.

Some of these mistaken ideas prevailed until very recent times. On March 12, 1863, when President Lincoln, after final adjournment of the 37th Congress, signed the "Abandoned Property Act," previously passed by that Congress, the first important step was taken in a reasonable interpretation and construction. Many people, however, continued to question the Executive's power to act during a recess, or to approve after final adjournment. The law was not settled until the decision in Weil v. U. S., 29 Ct. Cl. 523, had been confirmed by this Court in La Abra Mining Co. v. U. S. 175 U. S. 446, and President Wilson had signed the Water Power Bill in 1920 on advice of Attorney General Palmer (Op. Atty. Gen. Vol. 32, p. 223.)

There is no limitation, by language or implication in the Constitution that prevents the President from exercising revision over legislative acts and from returning bills with his objections to "that House" during hours and days when the existing Congress is not actually sitting in its House in active legislative session.

The present asserted right of silent pocket veto is a gradual development of asserted and unconstitutional Executive power. Most of the early so-called "pocket vetoes" embodied an actual return of the Bill with veto objections returned to the Congress when again sitting after the adjournment. Witness the Message of Madison, Nov. 5, 1812,

and that of Jackson, Dec. 6, 1830, accompanying the return of the vetoed bills. These first so-called pocket vetoes actually restored the bills to the Congress when again in session, with regular veto objections, in harmony with the general intent and purpose of the veto clause, and in accord with the construction that the ten days means ten legislative days. Madison expressed the opinion that the bill "having been presented too near the end of the session * * * failed to become a law." President Jackson returned another bill with specific veto objections with his message of Dec. 6, 1832. During those years the Executive still accorded to Congress its unquestionable right to receive back its legislation; to know the specific objections thereto, and to repass the legislation, if it desired, by two-thirds vote, notwithstanding the veto objections.

Though President Madison overlooked a minor bill in 1816, there was no practice of silent veto of bills, or return of legislation without specific objections, until December 14, 1842, when President Tyler returned to the 27th Congress in 3rd Session, H. R. 210 and H. R. 604, passed by that Congress in second session, without specific ground of objection to that legislation. This "silent" veto was not a "pocket" veto, for the President still recognized a constitutional duty to return the bill to the Congress, and his action still afforded the Congress the right to reconsider and to repass that legislation within its constitutional right before final adjournment. Therefrom arose the first use of the word "pocket" with reference to the withholding of bills. See Burrow's remarks, January 24, 1848, Congressional Globe, p. 225, *idem*, p. 203.

Silent pocket vetoes, or the practice by some Presidents of deliberately withholding bills presented within ten days of the adjournment of an intermediate sitting

or first session of a Congress, without return or objections, really began under President Johnson's administration. On April 20, 1867, Johnson filed a joint resolution with the Secretary of State without his approval and with a statement of his reasons. See Messages and Papers of the Presidents, Vol. VI, pp. 535, 536. This was the first positive assertion of a silent pocket veto power or of refusal of a President to return to Congress legislation submitted to him which he did not approve of or desire to become a law, and is the first precedent of positive Executive action expressly denying to the Congress the right to receive back its legislation and to enact it into a law notwithstanding the Executive's objections thereto. The withholding of this bill drew forth a strong opposition to such action and construction from the Congress. Congressman Elliott, in Congressional Globe, 1st Session, 40th Congress, p. 512, Col. 3, said: "The bill had already become a law by reason of not having been sent back during ten days." Senator Edmonds, Congressional Globe, 2d Session, 40th Congress, p. 720, after citing the decision of the New Hampshire Supreme Court in the Soldiers Voting Bill, 45 N. H. 607, and asserting a like construction for the quoted language in the Federal Constitution, said: "This construction of the Constitution now held by the Executive is altogether erroneous and would, in practice lead to very serious consequences." (See also Senate Debate and action on S. 366, 40th Congress, 2nd Session, Cong. Globe, pp. 1204, 1371, 1404, 1834, 1840, 2076 and Hind's Precedents, Section 3494.) Notwithstanding Senator Edmund's alleged change of opinion later, as claimed by Attorney General Miller, in 20th Op. Att'y. Gen. at page 503, 6, the Attorney General concludes his opinion as follows:

"Upon the whole I advise that bills coming to you during the recess of Congress, or within ten days prior thereto, be signed or vetoed as they meet your approval or disapproval, the bill, in case of veto, being returned when Congress reconvenes, and allow any questions as to their validity to be settled in court."

From the very first assertion, therefore, of this full claim of Executive right to kill legislation by silent pocket veto during existence of the Congress that passed it, there has been a denial of that right by Congress and the Judiciary Committees of the Houses, and the action of the House Committee on Judiciary of the 69th Congress, 2nd Session, with respect to H. Res. 739, and of the House itself in Committee of the Whole House in consideration of the Deficiency Appropriation Bill, shows a present existing conflict between the Executive and the Legislative Branches of this government with respect to the construction of this clause in the Constitution. (Rep. No. 2054, 69th Congress, 2d Session; Congressional Record, p. 4933.) In deciding this question the Judicial Branch of the government, as represented by this court, has sole power of construction and of final decision under the Constitution.

These Executive precedents, even if acquiesced in by a particular Congress, cannot defeat or change the policy, purpose, intent and the plain language of the Constitution, or deprive the people and their succeeding Congresses of the powers conferred by the Constitution, or enlarge the true limitations placed upon the Executive thereby.

Executive precedents of pocket veto are not unanimous.

Of the twenty-nine Presidents, an examination of their legislative records show that ten: Washington, John Adams,

Jefferson, Monroe, John Quincy Adams, Polk, Taylor, Fillmore, Pierce, and Garfield never recognized, claimed or asserted a right of "pocket veto." Others as Van Buren, Tyler, Polk, and Buchanan confined their pocket vetoing of bills strictly within the clear intent and purpose of the Constitution, and to bills presented to them within ten days of the final adjournment and dissolution of the Congress. Several other Presidents, while taking the mistaken view that the existence of a temporary recess adjournment of the Congress, prevented its bills from becoming laws under the ten-day clause, yet recognized the clear right of the Congress to receive back its bills and returned them with specific objections when the Houses again resumed active legislative sessions. There is no means of ever ascertaining by what majority the Presidents would have repudiated the present asserted right of the Executive to withhold and kill the legislation of an existing and continuing Congress.

The present asserted right of pocket veto is applicable to every adjournment of the Congress.

The present practice of silent pocket veto, and withholding of bills without return or objections has been clearly developed since President Johnson's time. As now asserted it applies equally when the Congress chance to be in adjournment for the remainder of the day, or for a day, or for the Christmas recess, and to the adjournment of first or intermediate sessions of the Congress. And if this asserted power may be exercised when Congress adjourns for Christmas recess, it may likewise be exercised when Congress adjourns for the remainder of the tenth day, or for the summer recess, for confessedly

the Congress has no power to curtail in any way the full ten days allotted to the President for his consideration and return of bills of the Congress.

On December 30, 1892, President Harrison signed a memorandum that he had, in effect, pocket vetoed, S. 2275, presented to him on December 15, 1892, because the Congress adjourned for customary recess from December 22, 1892, to January 4, 1893. There is no distinction between this adjournment and an adjournment for "the remainder of the day" or for the summer recess, except in duration. Under this asserted extraordinary Executive power, by implication and unreasonable construction, the policy, intent, purpose and the plain language of the Constitution have been defeated, and the Congress wholly deprived of a constitutional right to necessary and desired recess adjournments save and except that conditioned on the surrender of its exclusive right to legislate, and the loss of its right to receive back its legislation, and to repass it by two-thirds vote notwithstanding any objections of the President.

The true construction is not whether Congress has recessed or adjourned, but whether the Congress by their final or other adjournment have prevented a return of the bill with objections; and inability to return, should be construed to be equivalent to and co-existent with inability of the Congress to thereafter legislatively consider the bill and objections.

4. Obvious results from adhering to construction adopted by the court below.

The rule of construction is that the intent of the lawmakers shall be ascertained, that a harmonious whole shall

be sought if possible and that construction shall be avoided which will lead or may lead to absurd or illogical consequences. As said in New Lamp Chimney Co. v. Ansonia Brass Co., 90 U. S. 656-63:

> "Words and phrases are often found in different provisions of the same statute, which, if taken literally, without any qualifications, would be inconsistent, and sometimes repugnant, when, by a reasonable interpretation—as by qualifying both, or by restricting one and giving to the other a liberal construction—all become harmonious and the whole difficulty disappears."

A consideration of obviously possible results of holding that a pocket veto may occur whenever the Congress is in temporary adjournment during all or some of the ten days allowed the President for acting on legislation will demonstrate the necessity for a true rule and that the only true rule is one dependent on final adjournment of the Congress.

Assume that the Congress and the Executive are of opposite parties, or are of strongly divergent views. A tariff bill or a declaration of war is passed by the Congress and presented to the Executive, who proceeds to write a veto message, which by force of its importance or of circumstances, is not completed until two o'clock P. M., on the tenth day. On that day the body in which the bill originated and the Congress, by reason of death of the Speaker or a popular member, or other reason, adjourns immediately after assembling at noon. If the President cannot, because the Congress has adjourned, return his veto message to the Congress by forwarding same and making the return to an officer of the proper house to be laid before it upon resuming its sessions, then the Congress is deprived of its power and duty if two-thirds favor overriding the veto, and we

must have the anomaly of a new tariff bill or a new declaration of war repassed by the same Congress, without formal knowledge of the Executive's objections to their previous legislation, and a "pocket veto" greater in power than a veto message.

If, on the other hand, the President's message arrives at that House in which the bill originated and, finding the House adjourned, it is returned to the Executive Mansion undelivered, whereas the return, under the Constitution, could have been made to an officer of the legislative body chosen pursuant to the authority of the Constitution, then we have the condition that the bill has become a law without Executive disapproval, despite the intention of the Executive to disapprove—for the next day, when Congress may-hap will be in session, would be too late. As said by the Court in Harpending v. Haight, 59 Calif. 189, return should be made "in the most direct manner that circumstances would permit."

A holding that the return may be made in ten legislative days when the Congress is again in legislative session after the adjournment, or in ten calendar days, to the Congress though not in active session, in case the Congress has not finally adjourned, is the only construction that preserves true balance, rights, powers, and duties of all concerned. The fact that such construction may work inconvenience to a particular class of officers and persons (the Executive's messenger) furnishes no grounds for the Courts to ignore the evident intent of the provision. Chance v. Marion County, 64 Ill. 66.

As stated, a construction that the return can be made when the Congress is not in active session and can be made to an officer of the House of Representatives or the Senate, is a construction that adjournment for the session until the following December does not "prevent the return" being

made under the Constitution and leaves the main intent and purpose of the veto provision of the Constitution unimpaired. If an adjournment of one or two days does not prevent a return, neither does one of three months.

If the rules of Congress were in antagonism to the Constitution the rules would have to be changed; but, the rules are not in antagonism. The receipt of a message from the President is not the transaction of business. Congress may receive a message from the Executive even when not organized. It is action on the return which can be had by the Congress alone. The reception of a message from the President is not the transaction of business (Hind's Precedents, Vol. 5, Secs. 6600, 6647). The messages are received and retained and then submitted to the House or the Senate, as may be, whereupon the legislative functions proceed.

Within the meaning and intent of the Constitution the construction adopted by the lower court, legalizing the application of a "pocket veto" to the legislation of an existing and continuing Congress during the temporary recess of its legislative sittings, seems to be clearly in violation of the Constitution in the following respects:

(1) It is an unwarranted interference with the exclusive legislative power of Congress.

(2) It prevents consideration by Congress of the reasons on account of which the legislation is objectionable to the Executive.

(3) It prevents such corrective modification of the legislation as may commend itself to the mind of Congress.

(4) It constitutes an absolute prohibition against such legislation by the Executive, who is denied that power by the Constitution.

(5) It deprives Congress of its constitutional right to pass such a bill over the President's objections by two-thirds vote of both Houses.

(6) It is antagonistic to and defeats the revisionary intent and purpose of the veto clause.

(7) It defeats the very intent and purpose of the ten-day clause to which it is attached, the purpose of which was to prevent any defeat of legislation by the non-action of the President, and, by the construction adopted, the precise abuse sought to be guarded against is permitted.

(8) It is in derrogation of the reasonable exercise of the right of the Congress and of the Houses thereof to recess adjournments without jeopardizing or defeating their legislative acts.

(9) It ignores the plain meaning of the words; i. e., a prevention of return caused by adjournment.

(10) It unnecessarily defeats the clear intent that unreturned bills should become laws at the expiration of ten days, if it is reasonably possible for the President to return them to Congress.

(11) It thus unnecessarily and unreasonably obstructs and delays legislation.

(12) If legislation is to be enacted on the subject, it requires the Congress to again re-enact the identical bill, without formal knowledge of the reasons why the President withheld his approval from the prior enactment; and though two-thirds of each House re-enact it, the second bill may be likewise "pocket vetoed" should the Congress for any reason recess on the tenth day.

IV. Errors of Court Below.

As many of the points raised in the several assignments of error are closely related and have been suggested in the

foregoing statement and argument, for convenience and brevity they have been grouped in the following discussion thereon:

1. **The court below erred in not giving proper consideration to the purpose, intent, and policy of the makers of the Constitution, in the light of contemporary history .**
4. **The court below erred in not giving proper consideration to the subject, context, and the intention of the makers of the Constitution in construing this provision.**

The Primary Rule for Construction.

Judge Story, in Prigg v. Pennsylvania, 16 Pet. 539, 610, says:

> "Perhaps the safest rule of interpretation, after all, will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history; and to give to the words of each just such operations and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed."

See also: Justice Cooley in People v. Harding, 53 Mich., 481, 485, and Ex parte Wells, 18 Howard 307.

The Spirit and the History of the Times is opposed to any extension of veto power.

For even the most casual reference to the history of the times it is clear that there was then a determined intention on the part of the people to withhold

from the National Executive all power to defeat their legislative will as expressed by enactments of their Congress. The Articles of Confederation withheld all veto power. All contemporary State constitutions, except the Massachusetts constitution of 1780, denied to the governors even a qualified revisionary veto. The proposal to give the National Executive an absolute veto under the Federal Constitution was, after spirited debate, unanimously voted down. When the Constitution was drafted the great fear yet existing in men's minds was Executive usurpation and defeat of the popular will as expressed in legislative enactments. The use to which the King and the Royal Colonial governors had put their power was yet fresh in the memory of the people and of the delegates, most of whom had participated in the Declaration of Independence and in the War. The veto power was yet regarded with a very great distrust and disfavor and the people were extremely solicitious and jealous of that power, and any grant of it was at all times hedged about by carefully expressed limitations, and the right of its exercise by the Executive must always be supported by plain and undoubted authority. (People v. Buffalo (1898) 20 N. Y. Sup. 51, 53.) The Constitution gives the President no power to defeat legislation; merely a power to suggest revision and thereby require reconsideration of the bill by the Congress. If no revision is suggested or attempted, then the bill becomes a law, notwithstanding the President's failure to approve the bill, except such bills as may fall within the perview of the exception clause now under consideration.

2. **The court below erred in not giving proper consideration to the particular mischief this language was intended to prevent.**

3. The court below erred in so construing the provision as to defeat its evident purpose, when the construction urged by petitioners is equally accordant with the words and sense and would enforce and protect such purpose.

The specific purpose of the exception clause and of the ten-day clause to which it is attached.

The very obvious purpose of the exception clause, here under consideration, was to fix and declare the precise status of a Congressional enactment in event that the Congress which passed it should finally adjourn as an existing legislative body within the prescribed ten days and thereby defeat the revisionary purpose of the general veto clause, and curtail the full ten days allotted to the Executive for consideration and return of the bill with his objections. In other words, the ten-day clause was directed against a possible Executive abuse defeating legislation and nullifying the revisionary purpose of the veto provision; and the exception clause was directed against possible Congressional action that would likewise defeat the revisionary purpose.

It was never intended, under these provisions of the Constitution, that the Executive should, by withholding a bill, defeat legislation. The sole purpose of the ten days' clause was to prevent a delay or defeat of legislation by the failure or refusal of the Executive to sign and approve, or to return with specific objections legislation passed by the Congress and submitted to him for revision. If the President fails to act in approval or disapproval, the bill becomes a law; if the Congress, by final adjournment as an existing legislative body, leaves some of its legislation incomplete, in that the ten days allowed the Executive for its return has not elapsed, then such legislation dies with the expiring Congress, along with its other unfinished

legislative work, then in committees, in conference, or undisposed of on the calendars of its respective Houses. Even in this event it should be noted that it is the act of Congress in final adjournment, not the act of the Executive, in withholding bills, that determines their final fate as incomplete legislation of the Congress.

The construction adopted by the court below thus permits the very abuse sought to be guarded against by the ten days clause, while the construction urged by petitioners gives reasonable force and effect to the true purpose of the language.

5. **The court below erred in not giving due consideration to the obvious implication from the language of the constitutional provision that it was the President's duty to return the bill with his objections, if in any way reasonably possible to do so.**
6. **The court below erred in not holding that the adjournment intended by the Constitution was such an adjournment as would preclude all reasonable possibility of the return of the bill.**

In the construction of a Constitution what is implied is as much a part of the instrument as what is expressed. (Re Yarbrough, 110 U. S. 651.) There arises from the veto provision of the Constitution, coupled with the legislative provisions whereby sole power to legislate is vested in the Congress, a very clear implied duty, resting on the Executive, to return bills if in any way possible for him to restore them to the actual or potential possession and control of the Congress. The implication is as clear and compelling as any other implied power or duty under the Constitution. Unreturned, they become laws in ten days;

returned, Congress has final legislative power over them. By this clear implication a compelling duty is imposed on the President to return its bills to an existing and continuing Congress if in any way possible to do so, that the Congress may again have and exercise its legitimate control over the same. The court below erred in not giving consideration, weight and effect to this obvious implication, and in not holding that the adjournment intended by the constitution was such an adjournment as would preclude all reasonable possibility of the return of the bill and of subsequent action thereon by the Congress.

7. The court below erred in holding, in effect, that every adjournment of the Congress, whether temporary or final, would render it impossible for the President to return a bill with his objections.

As shown in the previous argument the sole exception, when unreturned bills fail to become laws in ten days, is not when a return is prevented by a recess of "that House," but when return is prevented by adjournment of "the Congress." There is no material distinction, except of duration and nomenclature, between adjournments for "the remainder of the day" and adjournments of an intermediate sitting or first session of a Congress. If return can and must be made to "that House" in the last hours of the tenth day, though recessed for the day, the Congress being yet in session, then a like return may be made when both Houses are in temporary recess, where the same Congress again sits after the adjournment.

The construction ten "legislative days," if adopted, permits the return on the tenth day falling in active legislative session when the Congress sits after the adjournment, and

precludes any prevention of return by adjournment other than final. There is a clear distinction between the effect of a temporary and of a final adjournment upon the ability of the President to make a return; and there is a wide difference between the capacity of an existing recessed Congress and of a dissolved and finally adjourned Congress to receive and act upon bills the President would return to them with objections. Recess adjournments, in reasonable construction, neither prevent a return nor reconsideration of legislation; final adjournment renders any return and any reconsideration impossible. It was error of the lower court not to perceive, consider and make such distinctions; the court also failed to make the distinction that the exception is not predicated on adjournment; it is predicated on a prevention of a return and the resultant defeat of the revisionary purpose of the veto clause by adjournment.

8. **The court below erred in not giving due consideration to the formal protests against the Presidential use of the "pocket veto" by the Judiciary Committees of the House and Senate.**
9. **The court below erred in the absence of decisions by this or other Federal courts in not giving due consideration to the construction of identical or similar language in State constitutions by the highest courts of such states.**

The Executive precedents of construction relied on by the lower court (R. p. 65, 66) are wholly unilateral constructions of a constitutional provision in the correct construction of which the Congress has an equal interest and right. The protesting voice of the Congress against what is claimed to be an erroneous and improper construction, and an infringement of its constitutional rights and pre-

rogatives, should have been given equal weight and consideration by the court. In final analysis, it may yet be observed that the power and duty of construction and interpretation of the Constitution is vested in the Judicial branch of the government, not in the Executive or in the Congress, and that the plain, unmistakable language of the instrument and the clear intent and purpose of those who framed and adopted it are to be recognized and preserved by the Court, regardless of contrary interpretation by the President or the Congress, and are to be changed only by formal articles of amendment solemnly adopted by the several States in the method prescribed by the instrument.

These precedents in construction (Executive and Congressional) do not have the weight of decisions of a Federal Court, yet considering the quasi-judicial character of the opinions of the Judiciary Committees of the Senate and House, and the construction of identical or similar language by the highest courts of several States, the lower court clearly erred in disregarding these dignified aids to correct construction and in considering, following and adopting only precedents of Executive construction which are opposed by these legislative precedents, by these State decisions, and by the whole policy, spirit, intent and language of the Constitution.

10. The court below erred in adopting a construction of the provision in conflict with and in derrogation of the right of Congress to adjourn and to pass this legislation, notwithstanding the Presidential "pocket veto."

A fundamental rule for construction is that it must be in harmony with and not in derrogation of the other rights and powers conferred by the instrument, and that,

unless the construction is harmonious, it should be rejected for another construction that will give harmony and effect to all the provisions.

The construction presented and urged by petitioners alone satisfies these requirements, and the construction adopted by the court below was clearly erroneous, for the reasons that it clearly infringes upon the rights of Congress and that of the Houses thereof to adjourn temporarily without jeopardizing their legislation theretofore presented to the President, or forfeiting their constitutional right to repass it by two-thirds vote notwithstanding any objections the President may have thereto, or surrendering to the Executive their sole and exclusive power of legislation, negative as well as affirmitive, vested in them by the Constitution.

11. The court below erred in holding that the adjournment of the First Session of the Congress prevented, that is, rendered impossible, the return of the bill by the President, with his objections.

Under the construction ten legislative days, return of the bill, S. 3185, could have been made within the constitutional period when the 69th Congress resumed its active legislative sessions on December 6, 1926. Under the construction ten calendar days, return could have been made within the constitutional period by delivery of the bill and any Executive objections, to the President, the Secretary, or a journal clerk of the Senate during the first two days of its summer recess, to wit: on July 4th or 5th, 1926, the 9th and 10th days (Sundays excepted) after the bill was presented to the President on June 24, 1926. Temporary adjournment of the Congress in no way prevented such return or defeated the purpose thereof.

Such return would permit the Congress to receive, know and to pass on revisionary objections to the bill and to enjoy the full exercise of all their Constitutional rights and privileges without infringement or curtailment by the Executive.

CONCLUSION

The purpose of the veto clause was to permit revision of legislation. The purpose of the ten-day clause attached thereto was to prevent delays or defeat of bills through the President's possession of and failure to return legislation. The purpose of the exception clause was to preclude Congress from defeating the revisionary purpose of the veto clause by other than final adjournment before the expiration of the ten days allotted therefor. The constant intent of the Constitution was that sole and final power over the legislation rests in the Congress up to its final adjournment.

The expressed will of the Constitution is that bills not signed or returned in ten days become laws.

The only exception is not "unless the Congress adjourn." The exception is "unless the Congress prevent the return by their adjournment." It is the clear intent and purpose that the President must return the bill if possible for him to do so. The impelling rule of construction is that the words shall be reasonably construed in harmony with and not in conflict with other provisions or in derrogation of other rights and powers specificially granted.

The construction urged by petitioners, i. e.., either ten legislative days, permitting return when the same Congress again sits after the recess; or, ten calendar days, requiring a return by delivery of the bill to proper officers of "that House" during its temporary adjournment, satisfies all the

requirements. That adopted by the lower court fails and must be rejected by the same tests.

Final adjournment alone, in reasonable construction, prevents return and reconsideration, and defeats the purpose of the veto clause. In event of temporary recess, return may yet be had. Restoration of the bill to the potential control of the Congress may be made by return to that House in recess, or when again sitting after the adjournment. This satisfies all reasonable requirements and is in harmony with the policy, spirit and intent of the instrument.

The construction adopted by the lower court fails, and must be rejected by the same tests. The adjournment of the 69th Congress on July 3, 1926, was not a final adjournment and did not relieve the President of his duty to make return of the bill in ten days (legislative or calendar) and did not prevent the return of the bill within the true meaning and intent of the Constitution. The bill S. 3185 is therefore an existing law, not having been returned to Congress within either ten calendar or ten legislative days after it was presented to the President on June 24, 1926.

For these reasons it is respectfully submitted that the decision of the Court below should be reversed and the case remanded thereto with instructions to vacate the judgment of April 16, 1928, and enter an order overruling the demurrer and requiring defendant to answer to the petition.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 565

THE OKANOGAN, METHOW, SAN POEILS (OR SAN POIL), NESPELEM, COLVILLE, and LAKE INDIAN TRIBES or BANDS of the State of Washington, petitioners

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

STATEMENT

Article I, Section 7, Clause 2, of the Constitution reads as follows:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Jour-

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 565

THE OKANOGAN, METHOW, SAN POELIS (OR SAN POIL), NESPELEM, COLVILLE, AND LAKE INDIAN TRIBES OR BANDS OF THE STATE OF WASHINGTON, petitioners

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 61) has not been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered April 16, 1928. (R. 66.) A motion for new trial was seasonably made and entertained and overruled October 22, 1928. (R. 67.) The petition for certiorari was filed December 4, 1928. (R. 67.) The jurisdiction of this Court rests on the Act of February 13, 1925.

THE QUESTION PRESENTED

The question presented is whether a bill which was passed by both Houses of Congress and presented to the President less than ten days, Sundays excepted, before the adjournment of the first session of the Congress, but which was not signed by him, nor returned by him to the House in which it originated, became a law without his signature.

Stated in another way, the question is whether the provision in Article I of the Constitution, to the effect that—

> If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law,

refers to any adjournment of Congress or only to final adjournment of the last session. It is also necessary to consider whether the clause relating to a bill returned without Presidential approval, directing that it be returned to that House in which it shall have originated, contemplates a return to a House in Session or allows a return to some officer of the House after the House has adjourned.

PROVISION OF CONSTITUTION INVOLVED

Article I, Section 7, Clause 2, of the Constitution reads as follows:

> Every Bill which shall have passed the House of Representatives and the Senate,

shall, before it become a law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Article I, Section 5, Clause 4, provides:

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, * * *.

STATEMENT

Senate Bill No. 3185, 69th Congress, First Session, entitled "An Act authorizing certain Indian tribes and bands, or any of them, residing in the State of

Washington, to present their claims to the Court of Claims," having passed both Houses of Congress and having been properly authenticated, was presented to President Coolidge for his consideration on June 24, 1926. On July 3, 1926 (eight days thereafter, Sundays excepted) the House of Representatives "adjourned sine die" and the Senate "adjourned until 12.30 o'clock p. m., Wednesday, November 10, 1926." (Cong. Rec., vol. 67, pt. 11, pp. 12885, 13009, 13100.) The President did not sign the bill nor did he return it with his objections to the House in which it originated.

Taking the position that the bill had thereby become a law, the petitioner filed a petition in the Court of Claims in accordance with the terms of the bill. The United States demurred on the ground that the bill had never become a law. The court sustained the demurrer and dismissed the petition. (R. 61, 66.) A rehearing was denied. (R. 66, 67.) On January 21, 1929, this Court grant a writ of certiorari. (R. 68.)

SUMMARY OF ARGUMENT

For an answer to the questions presented, we turn to the proceedings of the Constitutional Convention, consider the words of the pertinent clauses in the Constitution, and the practical construction which has been given to them.

The clause in the Constitution was evidently taken from a similar provision then in the constitution of the State of New York. The only signif-

icant thing in the action of the Constitutional Convention was that it deliberately omitted a provision then found in the New York constitution, to the effect that in case adjournment rendered the return of a bill impracticable it—

> shall be returned on the first day of the meeting of the legislature after the expiration of the said ten days.

The words of Article I leave no doubt as to their meaning. The provision that if the bill is not returned within ten days, Sundays excepted, it shall be a law, means ten calendar, not legislative, days. The Constitution has not excepted days in which Congress is not in session. Its exception of Sundays shows that every other day is to be counted. The provision—

> unless the Congress by their Adjournment prevent its Return,

means its return within ten days, and the return prevented by adjournment is a return within ten days, Sundays excepted. An adjournment would not prevent a return unless there was a time limit on the return. It would not prevent a return if the ten days were legislative days. There is no basis for limiting the application of the word "adjournment" to an adjournment at the end of a Congress. The Constitution itself uses the word "adjourn" in the broad sense. Congress loses its opportunity to pass a bill over the President's disapproval by not being in session on the tenth

day following its presentation to the President, if he fails meanwhile to return it.

The construction contended for by the petitioners contemplates that a bill may be returned to the House in which it originates although Congress has adjourned. This requires that the return may be to some officer of the adjourned House, to be retained in his custody until Congress reassembles. No Act has ever been passed authorizing any officer of either House to so receive returned bills, and there is no rule of either House giving such authority. The return must be to the House and not to an officer. The word "House," as used in the Constitution, has always been held to mean the House in session. No Message from the President, or Message from either House to the other, is received except by a House in session.

The practical construction given to this clause in the Constitution is controlling. Since the organization of the Government there have been 120 cases like this of so-called pocket vetoes, at *ad interim* adjournments. In no case, prior to the action of the House of Representatives in the 69th Congress, has any action been taken by Presidents or Congress on the theory contended for by petitioners, and in none of the 120 cases referred to has any of the pocketed measures been placed upon the statute books or treated as a law. This is the first case we know of where it has been asserted in court that such a pocketed bill became a law.

ARGUMENT

I

THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION CONTAINED ONLY ONE SIGNIFICANT ACTION

At the session of the Convention on August 6, the Committee of Detail's report contained in Article VI, Section 13, the following provision:

> * * * If any bill shall not be returned by the President within seven days after it shall have been presented to him, it shall be a law, unless the legislature, by their adjournment, prevent its return; in which case it shall not be a law.

The sentence just quoted was unquestionably based upon a clause of the New York constitution of 1777, which was then in force, with a very important modification. The New York constitution provided in Article III:

> * * * * *
>
> And in order to prevent any unnecessary delays, be it further ordained, that if any bill shall not be returned by the council within ten days after it shall have been presented, the same shall be a law, unless the legislature shall, by their adjournment, render a return of the said bill within ten days impracticable; in which case the bill shall be returned on the first day of the meeting of the legislature after the expiration of the said ten days.

It will be observed that the last twenty-three words were not followed in the Committee of Detail's report.

The provision proposed by the committee does not appear to have been discussed by the Convention until the end of the session of August 15, and the only reference to it in Madison's Notes is as follows:

> "*Ten* days (Sundays excepted)" instead of "*seven*" were allowed to the President for returning bills with his objections N. H. & Mas: only voting agst it.

The Committee of Style on September 12 reported two minor changes in the provision, making it read as finally adopted by the Convention:

> If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

On the following day Madison moved to insert between "after" and "it" the words "the day on which." This motion was defeated.

There was no discussion of any other portion of the sentence in the Convention; it was not mentioned in the Federalist; and it does not appear to have been discussed in any of the State conventions.

In State constitutions adopted after 1787 this provision of the Constitution of the United States was followed in numerous instances, of which only the New York constitution calls for consideration.

In 1822 the provision of that constitution quoted above was changed to read:

> * * * If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the legislature shall, by their adjournment, prevent its return; in which case it shall not be a law.

The convention discussed this clause on October 27, 1821. The change was proposed by Henry Wheaton, well known as the reporter of this Court and as an author. He moved to amend the amendment proposed by the committee of the whole by striking out the words—

> "in which case it shall be a law, unless returned on the first day of their next meeting," and inserting the following: "shall not be a law." Mr. W. stated his object to be to make the provision respecting bills, the return of which within ten days was prevented by the adjournment of the legislature, correspond with that in the Constitution of the United States, which seemed to him founded in wisdom. If Congress by their adjournment prevent the return of a bill by the President, it does not become a law. Nor was it fit that it should. The regulation proposed by the committee of the whole would enable the governor to keep in his own breast the secret whether a particular bill would or would not ultimately become the law of the land; and might enable those by whom he

> was surrounded to profit by that knowledge, which they alone would possess, to the disadvantage of the public in general. Such a practice would draw after it many of the evils of the secret legislation of despotic governments, and would certainly be abused to corrupt purposes in many cases where private rights were involved, or private interests affected by measures of a general and public character.
>
> The subject was further discussed by Messrs. King, Spencer, and Van Buren, when the question was taken on the amendment [to the report of the committee on the whole] and *carried*. (Report of the Debates and Proceedings of the Convention of 1821.)

The significant thing in the action of the Federal Constitutional Convention was the omission from the Constitution of the United States of the provision in the New York constitution that in case of adjournment the bill might be returned on the first day of the next session. The action of the New York constitutional convention in 1822 is significant in that it struck out that provision in its own constitution and adopted a clause like that in the Constitution of the United States.

II

THE WORDS USED IN THE CONSTITUTION ARE NOT FAIRLY SUSCEPTIBLE OF THE CONSTRUCTION URGED BY THE PETITIONERS

The petitioners advance several contentions, involving changes in the wording of the Constitution,

in order to sustain their contentions. They suggest that the clause that a bill shall be a law if it—

> shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him—

may mean ten legislative days—that is, ten days during which Congress shall have been in session. The Framers of the Constitution did not say that. They did not except from the ten-day period days in which Congress is not in session. The only exception is of Sundays, and there is no basis for inserting the word "legislative" after the word "ten." Besides, an adjournment of Congress would not prevent return within the specified time if the ten days mean ten days in which Congress is in session. No President has ever acted on the assumption that he had ten legislative days to consider a bill.

It is also clear that the clause—

> unless the Congress by their Adjournment prevent its Return

means a return within ten days, Sundays excepted. It follows that the return by the President must be made within ten calendar days, Sundays excepted, after the bill is presented to him. A bill returned without his approval to a subsequent session commencing more than ten days after presentation of the bill to the President is not a return within ten days. The President has ten days, Sundays excepted, after the bill shall have been presented to him in which to consider it, and if on the tenth day he is ready to return it without his approval, and is

unable to return it because of an adjournment, it does not become a law. If Congress has adjourned, how is a bill to be returned? To meet this difficulty with the petitioners' argument, they suggest that the bill may be returned to an officer of the House in which it originated, although that House may have adjourned. The Constitution states that the bill shall be returned to the "House" in which it shall have originated.

Returning it to an officer of either House after adjournment of Congress is not returning the bill to the Congress. There has never been any statute authorizing any officer of either House to receive bills returned by the President during adjournments, and there is no rule to that effect in either House. It has been the universal practice of the Houses of Congress to receive Messages from the President, or Messages from one House to the other, only while in session. (Hinds' Precedents, vol. 5, chap. CXXXVIII.) The rules of each House contemplate that Messages from the President or from one House to the other shall be received while the House to which the Message is directed is in session. (See Rule XI., House of Representatives; Rule XXVIII, Standing Rules of the Senate; Jefferson's Manual, XLVII.)

Curtis in his Constitutional History of the United States, 1889, Vol. I, p. 486, in the footnote, says:

> This expression, a "house," or "each house," is several times employed in the Constitution with reference to the faculties

> and powers of the two chambers respectively, and it always means, when so used, the constitutional quorum, assembled for the transaction of business, and capable of transacting business. This same expression was employed by the committee when they provided for the mode in which a bill, once rejected by the President, shall be again brought before the legislative bodies. They directed it to be returned "to *that* house in which it shall have originated"—that is to say, to a constitutional quorum, a majority of which passed it in the first instance * * *,

(citing Elliot, V, 349, 376, 378, 431, 536).

Hinds' Precedents show that a House in session may receive a message although a quorum is not present.

In 1868 the Judiciary Committee of the Senate reported a bill to regulate the presentation of bills to the President and the return of the same. (Cong. Globe, 40th Cong., 2d Sess., Part 2, pp. 1204, 1371.) It purported to authorize the President, when returning a bill to a House which was not in session, to return it to the Secretary of the Senate or the Clerk of the House, as the case might be, and to authorize the Secretary or the Clerk to endorse on it the date of its receipt and hold it until the House reassembled. That bill was not passed. We can not improve on the argument of Senator Davis, who then said (pp. 1372, 1373, 1405):

> Here is an objection that occurs to me at present to this bill: the Constitution requires that if the President does not approve a bill he shall return it with his objections to the

House in which it originated; this bill provides a different mode of disposing of that bill in case Congress has temporarily taken a recess or an adjournment. It dispenses with the requisition of the Constitution that the bill shall be returned to the House, and directs that it be returned to the officer of the House, if the body is not in session. I do not believe it is competent for Congress to make any such change as that. I believe that the Constitution is mandatory in that respect; that the bill, where the President vetoes a bill, must be returned to the House, and not to the officers of the House. Of course, if he is to return the bill to the House, the House must be in session, because it is not a House unless in session in the sense in which the Constitution requires the bill to be returned to the House by the President with his objections. * * *

I think it is the duty of the President, in the plain language of the Constitution, to return the bill, not to the Secretary or Clerk of either House, but to the House itself. That is the unambiguous and plain language of the Constitution. Then the question is, what is returning the bill to the House? It is returning it to the Senate or the House of Representatives in session, because when it is returned it is to be at once considered again. The Constitution contemplates that simultaneously with the return of the bill to the House in which it originated the House may take up the matter for consideration. But, sir, I think there can not be any doubt what-

ever as to the effect of the language. The language is, that the bill shall be returned to the House in which it originated. I take the position that to return the bill to the Clerk of the House of Representatives, if it originated there, or to the Secretary of the Senate, if it originated in the Senate, when those bodies are not in session, is not a return of the bill to the House in which it originated. * * *

Suppose the Constitution or the law requires the President to communicate to the two Houses or either of the Houses in the performance of that duty, when both Houses or the particular House to which he is directed to make communication be not in session, is he authorized to communicate to the Secretary or to the Clerk of that House? I conceive not. It is the duty and the right of the President to communicate to the House and not to a ministerial officer of the House. To enable him to communicate to the House it must necessarily be in session, because he can not communicate with either House when it is in any other situation than in actual session. It must be assembled and in actual session. * * *

Senator Bayard said on the same subject (p. 1941):

But, Mr. President, there is an additional objection which to my mind is all powerful. The committee propose in the same section, not intending to deprive the Executive of the ten days to which he is entitled, that if Congress is not in session during the ten days or

> at the end of the ten days the President may send the bill to the office of the Secretary of the Senate or the Clerk of the House of Representatives, according to the House in which the bill may have originated. There is no such provision in the Constitution; and the settled usage of this Government, without a single exception from its foundation, is that no communication is made by the Executive to either House except to the House in session, and that usage ought to have a controlling influence to exclude the idea which is contained in the provision of the bill that I am now referring to. • • •

If it is not legally possible to return a bill to a House not in session, it is plain the petitioners' argument must be rejected.

It is obvious that an adjournment would not prevent a return if return may be made to an officer of a House not in session.

There is no basis in the Constitution for the contention that the word "adjournment" relates only to an adjournment of a final session. In 1868, in considering the bill last referred to, Senator Bayard said on this subject (p. 1941):

> The construction given by the committee is, in my judgment, erroneous in two respects. In the first place, the committee confine the term "adjournment," as used in the Constitution, to a particular meaning not justified by its received signification at the time of the passage of the Constitution and now, or by its etymology. An adjournment

> may be defined to be, I will not say a suspension of business, but a postponement of session for a period of one day, from one day to another, or for any number of days. That is an adjournment. It may be from day to day; it may be without day; it may be for a period of ten days or three months. Each is equally included under the word "adjournment." The committee, however, propose to confine the meaning of the word "adjournment," as used in this clause of the Constitution, to adjournment without day. The Constitution uses no such language. It is necessary to add to the general term "adjournment" there used the words "without day," or "*sine die*," in order to justify the construction for which the committee contend.

That the word "adjournment" has no such narrow meaning as petitioners contend for is shown by the fourth clause in Section 5 of Article I of the Constitution, which provides:

> Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days * * *.

The word "adjourn" in that clause was not used in the sense petitioners contend for.

In the 69th Congress, 2d Session, the Judiciary Committee of the House made a report (House Report No. 2054, 69th Cong., 2d Session) in which it expressed the conclusion that H. R. 5218, "An Act to carry into effect the twelfth article of the

treaty between the United States and the Shawnee Tribe of Indians," having on July 3, 1926, passed both Houses, and having been then presented to the President, became a law, although there was a final adjournment on July 3, 1926, of the first session of the 69th Congress, and the President did not approve the bill nor did he disapprove it and return it to the House in which it originated, or make any return to either House. On the strength of that report, and adopting it as the law, the Chairman of the Committee of the Whole, considering the statute to have become law, overruled a point of order made against the inclusion in an appropriation bill of an appropriation to provide funds to carry the statute into effect. (Cong. Rec., Vol. 68, Part 5, pp. 4932, 4937.)

No appeal was taken from his ruling. The reasons to support the view of the Judiciary Committee are fully set forth in the debates. (Cong. Rec., above referred to, pp. 4932–4937.) Those supporting the view of the Committee were forced to conclude that a bill might be returned to a House not in session by leaving the bill with its Clerk. We have the utmost deference for the views of the learned Members of the Judiciary Committee of the House. We feel confident, however, that if there had been presented to the Committee the constitutional difficulties in the way of returning a bill to a House not in session, and the overwhelming practical construction of the Constitution afterwards disclosed, in House Doc. 493, hereinafter

referred to, the Committee's conclusion would have been the other way. The House of Representatives has itself always used the word "adjournment" as describing the adjournment taken at the end of a session as well as the final adjournment of a Congress. Its Rule XXVI provides:

UNFINISHED BUSINESS OF THE SESSION

> All business before committees of the House at the end of one session shall be resumed at the commencement of the next session of the same Congress in the same manner *as if no adjournment had taken place.* (Italics ours.)

The only decision of this Court having any bearing on this subject is *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423. In that case the President signed a bill while Congress was in recess, but within the ten days after it was presented to him. The Court held that the President had power to sign a bill during the recess. It reserved the question whether he could sign a bill after adjournment for the session, as a question not arising in the case.

It is probable that the logic of our position leads to the conclusion that there is no distinction between an adjournment and a recess, so called. If a bill to be returned to the House in which it originated must be returned to the House while in session, it follows that if the House in which it originated is not in session on the tenth day after presentation

to the President, and he does not approve it or return it, it is not a law.

The inevitable conclusions are: (1) That the ten-day period referred to is not a period of ten legislative days, but ten calendar days, Sundays excepted; (2) that the return prevented by an adjournment is a return within ten calendar days, Sundays excepted, after presentation of the bill to the President; (3) that such a return is prevented by an adjournment by which the House in which the bill originated is not in session on the tenth day after presentation, and that the word "adjournment" refers to any adjournment and not alone to an adjournment at the end of a Congress.

III

THE PRACTICAL CONSTRUCTION IS CONTROLLING, AND IT COMPLETELY SUSTAINS THE RESPONDENT'S POSITION

Under date of December 22, 1928, the President transmitted to the Congress a copy of a memorandum prepared in the office of the Attorney General showing the results of an exhaustive research of governmental archives, for the purpose of disclosing the practical construction placed upon the constitutional provisions here involved. (House Document No. 493, 70th Cong., 2d Session.) That memorandum covers so-called pocket vetoes at the final sessions of the Congress as well as those at *ad interim* adjournments of sessions.

The memorandum discloses that there are 120 instances in which the Presidents have pocketed

bills presented during a session of Congress, but less than ten days, Sundays excepted, before an adjournment which did not mark the end of that Congress.

With the exception of the action of the House to which we have referred, occurring in the 69th Congress, we have been unable to find any case where either House of Congress has ever proceeded on the theory that a bill so pocketed had become a law.

No such bill has ever been spread on the statute books, or afterwards recognized as law. In some cases new legislation has been enacted on the subject. In a case like this, practical construction is controlling. (*Myers* v. *United States*, 272 U. S. 52.)

To hold with petitioners in this case would be to resurrect 120 bills, pocketed, as was this one, at various dates since the adoption of the Constitution, and place them on the statute books.

A review of some of the material bearing on practical construction is set forth in the appendix hereto, at page 31.

IV

DECISIONS OF STATE COURTS FURNISH LITTLE AID IN THE DECISION OF THIS CASE

The Massachusetts constitution of 1780 provided (Chapter 1, section I, article II):

> • • • in order to prevent unnecessary delays, if any bill or resolve shall not be returned by the governor within five days after

> it shall have been presented, the same shall have the force of a law.

In *Opinion of the Justices*, 3 Mass. 567, the court said very briefly that a bill sent to the governor less than five days before the end of the legislature would not become a law without his signature, but that if a bill were sent to him before a recess he would have a total of five days before and after that recess in which to pass upon the law. The court does not appear to have had the benefit of argument before reaching its conclusion, and it does not support its conclusion with discussion.

The first amendment to the Massachusetts constitution, adopted in 1821, contained this provision:

> If any bill or resolve shall be objected to, and not approved by the governor; and if the general court shall adjourn within five days after the same shall have been laid before the governor for his approbation, and thereby prevent his returning it with his objections, as provided by the constitution, such bill or resolve shall not become a law, nor have force as such.

In New Hampshire Section VLIV of Part Second of the constitution of 1792, which was in force in 1864, provided:

> • • • If any bill shall not be returned by the governor within five days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the legislature,

> by their adjournment, prevent its return, in which case it shall not be a law.

The court, in an advisory opinion on *The Soldiers' Voting Bill*, 45 N. H. 607, declared that calendar and not legislative days were meant in this provision.

The same position was taken in *Hequembourg* v. *City of Dunkirk*, 49 Hun (N. Y.) 550.

In *Harpending* v. *Haight*, 39 Cal. 189, the constitution provided:

> Every bill which may have passed the legislature shall, before it becomes a law, be presented to the governor. If he approve it, he shall sign it; but if not, he shall return it, with his objections, to the house in which it originated, which shall enter the same upon the journal, and proceed to reconsider it. If, after such reconsideration, it again pass both houses, by yeas and nays, by a majority of two-thirds of the members of each house present, it shall become a law, notwithstanding the governor's objections. If any bill shall not be returned within ten days after it shall have been presented to him, (Sundays excepted), the same shall be a law, in like manner as if he had signed it, unless the legislature, by adjournment, prevent such return.

The court held that the bill must be returned within ten calendar days and that if the legislature were not in session it should be returned to one of the officers of the legislature.

In *Corwin* v. *Comptroller General*, 6 S. C. 390, the constitution provided:

> Every bill or joint resolution which shall have passed the general assembly, except on a question of adjournment, shall, before it becomes a law, be presented to the governor, and, if he approve, he shall sign it, if not, he shall return it, with his objections, to the house in which it shall have originated; which shall enter the objections at large on its journals, and proceed to reconsider it. * * * If a bill or joint resolution shall not be returned by the governor within three days after it shall have been presented to him, Sundays excepted, it shall have the same force and effect as if he had signed it, unless the general assembly, by their adjournment, prevent its return, in which case it shall not have such force and effect unless returned within two days after their next meeting.

The court held that this means an adjournment of both houses; and if only one house has adjourned that is not sufficient. It held that the governor might return a bill to one of the officers of the legislature even though the house of which he was an officer was not in session.

In *Miller* v. *Hurford*, 11 Neb. 377, the State constitution provided:

> Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it; but if not, he shall return it, with his objections, to that house in which

> it shall have originated, who shall enter the objections at large upon the journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of the members present shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members present it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the members voting for or against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law, unless the legislature shall, by their adjournment, prevent its return, in which case it shall not be a law.

The court held (pp. 380, 381):

> This act was not signed by the governor, but is certified by the presiding officers of the senate and house of representatives. It is objected that the senate and house adjourned before the expiration of three days from the time the bill was presented to the governor for his approval. It appears from the journals of the two bodies that the adjournment was had from the twenty-ninth of March, 1871, to the thirtieth of May, of that year, and that the governor had possession of the bill for more than three days while the legislature was in session, it being

> retained until June 6, 1871, the legislature being in session from May 30th. The provisions of section 19, article III, of the constitution of 1867 apply to adjournments *sine die* and not to adjournments from time to time.

In *People* v. *Hatch*, 33 Ill. 9, where the State constitution provided:

> • • • If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the general assembly shall, by their adjournment, prevent its return, in which case the said bill shall be returned on the first day of the meeting of the general assembly, after the expiration of said ten days, or be a law,

the court said (pp. 135–138, 166) that full calendar days and not merely legislative days were meant by the provision.

In State v. *South Norwalk*, 77 Conn. 257, where the constitution provided:

> • • • If the bill shall not be returned by the Governor within three days, Sundays excepted, after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the General Assembly, by their adjournment, prevents its return; in which case it shall not be a law,

the court said (pp. 262, 263):

> It follows that the term "three days" as used in the Constitution, when read with due

> reference to the context, can not have been employed to denote in all cases three calendar days. It denotes a period which can not end except upon a day when the house to which this provision refers is or has been in session. * * *
>
> * * * * *
>
> If "three days" means three calendar days, the Governor was often deprived by this new practice of his constitutional right to keep under consideration within that period any bills that might be presented to him on the day of adjournment. If, on the other hand, "three days" means three days during each of which it is possible to return a bill to the house in which it originated, there was no infringement of his prerogatives.

In *State* v. *Joseph*, 175 Ala. 579, the constitution provided:

> * * * If any bill shall not be returned by the governor within six days, Sundays excepted, after it shall have been presented, the same shall become a law in like manner as if he had signed it, unless the Legislature, by its adjournment, prevent the return, in which case it shall not be a law; but when return is prevented by recess, such bill must be returned to the House in which it originated within two days after the reassembling, otherwise it shall become a law * * *.

The court said (p. 585):

> The authorities are unanimous in holding that the adjournment of the Legislature contemplated in the quoted clause of the Consti-

> tution is a final adjournment. It seems necessary, also, to hold that the limit of time during the session—that is, where there has been no final adjournment—within which the Governor shall return a bill in order to prevent it becoming a law without his approval and signature, or, perhaps, it would better express the intent of the provision to say the period of time during which the Governor has the right to consider a bill without its becoming a law independently of him, must be measured by calendar days; for otherwise there would be no reason for excepting Sunday, on which day it is not the practice of legislative bodies in this country to sit for the business of legislation.

In *Johnson City* v. *Eastern Electric Co.*, 133 Tenn. 632, the constitution provided:

> If the Governor shall fail to return any bill, with his objections, within five days (Sundays excepted) after it shall have been presented to him, the same shall become a law without his signature, unless the General Assembly, by its adjournment, prevents its return, in which case it shall not become a law.

The court held that the governor had only five days to consider the bill, even though the legislature might be in recess all that time; that during that time, unless the legislature had finally adjourned, he must return to the legislature or its officers any law of which he disapproved.

These cases, it is submitted, do not show such weight of authority in favor of the proposition that legislative rather than calendar days are meant in the provisions dealing with the return of unapproved bills as to cast doubt upon the long-established practice respecting Federal legislation.

Some of the State courts have held that when a legislature is not in session a bill may be returned to officers of the legislature. (*The Soldiers' Voting Bill*, 45 N. H. 607, 610; *Corwin* v. *Comptroller General*, 6 S. C. 390, 398; *Johnson City* v. *Eastern Electric Co.*, 133 Tenn. 632, 644. See also *Harpending* v. *Haight*, 39 Cal. 189, 200; *Hequembourg* v. *City of Dunkirk*, 49 Hun (N. Y.) 550, 556.)

Other courts have held that a bill may be returned only when the legislature is in session. (*People* v. *Hatch*, 33 Ill. 9, 135; *State* v. *South Norwalk*, 77 Conn. 257, 261; *State* v. *Joseph*, 175 Ala. 579. See also *People* v. *Bowen*, 21 N. Y. 517, 523; 30 Barbour, 24, 30. Compare *United States* v. *Allen*, 36 Fed. 174, 176; *Tuttle* v. *Boston*, 215 Mass. 57.)

In the State decisions there is no preponderance of opinion in favor of the position that a bill may be returned to officers of the legislature when the legislature itself is not in session.

CONCLUSION

The words of the Constitution and the practical construction heretofore placed upon them lead inevitably to the conclusion that the *ad interim* ad-

journment of Congress in this case prevented the return of the bill without Presidential approval, and that the Court of Claims was right in holding that it had not become a law.

Respectfully submitted.

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MARCH, 1929.

APPENDIX

REVIEW OF INSTANCES OF PRACTICAL CONSTRUCTION

A memorandum which was prepared in the Department of Justice and sent by President Coolidge to Congress on December 22, 1928 (70th Congress, 2d session, House Document No. 493) cites 458 bills and resolutions which were passed by Congress and submitted to the President less than ten days before the adjournment of Congress, which were not signed by the President and which therefore failed to become effective, although if Congress had remained in session they would have become effective regardless of the nonaction by the President.

It is true that many of these bills and resolutions call for but slight consideration. In one instance, under President Lincoln, a joint resolution had not been properly authenticated, and it failed for that reason also. In many other instances the bills or resolutions were presented within ten days (Sundays excepted) of the end not only of the session but of the Congress. In other instances bills were not presented to the President until after Congress had adjourned, and some Presidents labored under the impression that they could not sign bills after Congress had adjourned. (Compare 32 Op. A. G. 225.)

But there are also 120 instances in which the President "pocketed" a bill which was presented to him during a session of Congress but less than

ten days (Sundays excepted) before an adjournment which did not mark the end of that Congress. The Presidents have uniformly treated such bills in precisely the same manner as they have treated bills received near the end of the short session; and they have uniformly treated bills originating in the Senate in the same manner as they have treated bills originating in the House of Representatives.

As pointed out in the House Document on Pocket Vetoes, President Madison pocketed a bill relating to naturalization which was passed near the end of the first session of the 12th Congress. Concerning this bill he sent a message to Congress at the beginning of its next session, saying:

To the Senate and House of
Representatives of the United States:

The bill, entitled "An Act supplementary to the acts heretofore passed on the subject of an uniform rule of naturalization," which passed the two Houses at the last session of Congress, having appeared to me liable to abuse by aliens having no real purpose of effectuating a naturalization, and therefore not been signed; and having been presented at an hour too near the end of the session to be returned with objections for reconsideration, the bill failed to become a law. I also recommend that provision be now made in favor of aliens entitled to the contemplated benefit, under such regulations as will prevent advantage being taken of it for improper purposes.

J. MADISON.

NOVEMBER 5, 1812.

It will be observed that the term of Congress had not expired but that the second session was in-

formed why a bill passed at the first session of that Congress had not become a law. The message was not in the form of a veto message. It was sent to both Houses and not merely to the House in which the bill originated, and the bill was not returned for further consideration. The engrossed bill can not now be found.

On the same day as the message was received, the House of Representatives referred it to a select committee. (Annals of 12th Cong., 2d sess., 141.) The committee reported a new bill on November 18 (Ibid. 153); the bill passed the House on February 23 (Ibid. 1110); it reached the Senate on the same day (Ibid. 100); the committee to which it was referred reported it with an amendment on February 26 (Ibid. 109); it passed the Senate in amended form on the evening of March 3 (Ibid. 121) and reached the House too late for it to act on the amended bill (Ibid. 1170). So far as appears in the Annals of Congress, no member of Congress questioned the right of the President to pocket the bill which had passed both Houses in the first session.

In the 14th Congress, first session, a bill "for the free importation of stereotype plates and to encourage the printing and gratuitous distribution of the Scriptures by the Bible societies within the United States" was sent by the House of Representatives to the Senate on April 12, 1816 (Annals of that session, 311), and was passed by the Senate on April 25 (Annals, 352). The Congress adjourned on April 30. (Annals, 372, 1466.) President Madison did not sign the bill nor did he return it to the House of Representatives or to Congress. It is now in the

State Department in a bound volume labeled "Pocketed Laws." So far as appears from the Annals of Congress, the pocketing of this bill was not discussed at the next session.

President Madison clearly understood that he could not return these two bills to Congress when that body was not in session and he did not return them to later sessions of the Congress in which they originated. His interpretation of the provision of the Constitution relating to the enactment of legislation is entitled to great weight. He had had abundant legislative experience in Congress and in the Virginia legislature before the Constitutional Convention of 1787, he had been one of the leaders in the framing of the Constitution and in securing its adoption in the Virginia convention, and he had been a leading member of Congress under the Constitution. He was especially well qualified to decide upon the disposition of bills which were submitted less than ten days before the adjournment of Congress and which were not approved by the President.

Fourteen years passed before another President met this problem. In December, 1830, at the opening of the second session of the 21st Congress, President Jackson's annual message stated his reasons for refusing to sign two bills which he had received at the end of the first session, and with this message he returned one bill to the Senate and one bill to the House of Representatives. The message was not an ordinary veto message, but, considering the return of the bills to the Houses in which they originated, his action was at least equivocal. He had on his hands two unsigned bills which had not become

laws and apparently he did not know how Madison had disposed of bills under such circumstances. But his action at this time should be read in the light of the course taken by him three years later in returning to the Senate at the first session of the 23d Congress a bill which he had pocketed at the end of the preceding Congress and stating his reasons for not approving of the action of the previous Congress. Clearly in that instance the President was not giving the new Congress an opportunity to override a veto.

In December, 1832, at the opening of the second session of the 22d Congress, President Jackson returned to the Senate, in which it had originated, a bill which had been passed at the end of the first session "with the reasons which induced me to withhold my approbation, in consequence of which it has failed to become a law"; and on the same day he returned to the House of Representatives, in which it had originated, a bill which had passed at the end of the first session, saying, "I have been compelled to withhold from it my signature; and it has therefore failed to become a law." Neither House of Congress took any further vote on either of these two bills.

In December, 1833, President Jackson returned to the Senate at the first session of the 23d Congress a bill which had been sent to him at the end of the second session of the 22d Congress, and with it he submitted to the Senate reasons why the bill should not become a law. The bill had finally passed on March 1 and Congress had adjourned on the legislative day of March 2. Although the bill was returned to the Senate, together with reasons

why it should not become a law the message can not be considered as vetoing a bill passed by a previous Congress, and the Senate took no steps towards passing the bill over the veto. Five days later Senator Clay introduced a similar bill. (Cong. Debates, vol. 10, pt. 1, col. 23; Cong. Goble, vol. 1, p. 18.)

The message of the President was discussed at some length. (Cong. Debates, vol. 10, pt. 1, cols. 15–18.) A few extracts from the discussion are interesting:

"Mr. Benton then moved to take up the message for consideration."

"Mr. Moore said he thought that the Senator from Missouri would have another opportunity of offering what he wished to say; and he was himself desirous to move the printing of an extra number of the Message."

"Mr. Benton said that a shameful and unfounded attack had been made on the President, and he wished to repel it."

"Mr. Poindexter said he should have no objection to vote for the motion, if he knew what was to be considered. If the gentleman would show that there could be any action on the subject, he would agree. This was one of the acts of the Executive which was out of order. He had sent to the Senate his constitutional objections to a bill which had become defunct by the expiration of the last Congress. It was a document intended not for the Senate, but through that body to give to the people the reasons by which he had been influenced. There could be no action on the subject by the Senate. The Constitution prescribes that, when a bill was

returned by the President, the ayes and noes should be taken, and if two-thirds of both Houses should vote for its passage, it should become a law, the President's objections to the contrary notwithstanding. But it was necessary that the bill should be returned to the Congress by which it was passed. There could now be no action on the subject; and the President had sent his reasons here without intending that there should be any reply to them. The paper, therefore, was sent out of time, like many other papers which had been sent to the Senate from the same quarters, since he (Mr. P.) had been there; and it was not competent to the Senate to take any course respecting it. It was a message to the people, through the Senate; and that he presumed was the impression of the gentleman from Alabama, when he expressed a wish for the printing of an extraordinary number. If the bill had become a law, no action of the Senate could annul it; if not, they could do nothing to make it so. He was against considering it now, or at any time."

Senator Poindexter was unquestionably in the right when he said that the bill had become defunct by the expiration of the previous Congress. As the Senate afterwards ordered the printing of five thousand extra copies of the message, it is possible that it felt that the message was not intended solely for legislative consideration.

Senator Clay attacked the action of the President, taking the extreme position that the President could not pocket a bill at the end of the short session. He said:

"And he must repeat, that the withholding of the land bill, at the last session, under all the circum-

stances of the case, was a violation of the Constitution, and disrespectful to the Senate." * *

"It may be true that there was a great press of business on the President on the 2d of March, and that he may have acted upon some ninety or one hundred bills. But this is what occurs with every President on the day before the termination of the short session of Congress. With most of those bills the President must have been less acquainted than he was with the land bill. Of some of them he probably had never heard at all. Not one of them possessed the importance of the land bill. How did it happen that the President could find time to decide on so many new bills, and yet had not time to examine and dispose of one which had long been before him and the public; one embracing a subject which he thought the union, harmony, and interest of the States required should be speedily adjusted; one which he himself had pronounced his judgment upon at the commencement of this session? By withholding the bill, the President took upon himself a responsibility beyond the exercise of the veto. He deprived Congress altogether of its constitutional right to act upon the bill, and to pass it, his negative notwithstanding.

"The President is, by the Constitution, secured time to consider bills which shall have passed both branches of Congress. But so is Congress equally secured the right to act upon bills which they have passed, and which the President may have thought proper to reject. If he exercises his veto, and returns the bill, two-thirds may pass it. But if he withholds the bill, it can not become a law, even although the two Houses should be unanimously in its favor.

"Mr. C. denied that the Constitution gave to the President ten days to consider bills, except at the long session. At that session, the period of its termination is uncertain, and dependent upon the will of Congress. To guard against a sudden adjournment, by which the President might be deprived of due time to deliberate on an important bill, the Constitution provides for ten days at that session. But, at the short session, it is not an adjournment, but a dissolution of Congress, on the 3d of March; and the day of that dissolution is fixed in the Constitution itself, and known to all.

"Mr. C. contended, therefore, that the act of withholding the bill was arbitrary and unconstitutional; by which Congress, and the Senate especially, in which the bill originated, were deprived of their constitutional right of passing on the bill, after the President had exercised his powers. Respect to Congress required of the President, if he really had not time to form a judgment on the bill, or, having formed it, had not time to lay his reasons before the body, a communication to that effect. But, without condescending to transmit one word upon the subject to Congress, he suffered the session to terminate, and the members to go home destitute of all information, until this day, of his intentions.

"Mr. Benton said that no quorum sat, in either House, on the evening after the day on which the bill was sent to the President.

"The message was then laid on the table, when

"Mr. Moore moved that 5,000 extra copies of the message be printed for the use of the Senate; which motion was adopted."

Senator Clay certainly did not take the position that the President is without power to pocket a bill which comes to him at the end of the long session of Congress.

In December, 1834, at the commencement of the second session of the 23d Congress, President Jackson sent to Congress a message in which he said that he had withheld his approval from a bill to improve the navigation of the Wabash River, which had passed both Houses at the first session, and he returned the bill to the Senate, in which it had originated. The unsigned bill is now in the custody of the Secretary of the Senate. Written in ink upon the bill itself where the President would sign if he approved are the words "Not Approved." The power of the President to pocket this bill was not challenged, but a new bill was introduced and passed the Senate even though it did not receive the two-thirds vote which would have been necessary to override a veto. (Cong. Globe, vol. 2, pp. 40, 102.) The House did not act upon the bill.

In August, 1842, at the end of the second (not the last) session of the 27th Congress, President Tyler pocketed two bills which originated in the House of Representatives. In December, 1842, at the beginning of the third session of that Congress, he sent to the House of Representatives a message concerning those two bills. The message is, with other presidential messages to the House of Representatives, now in the custody of the manuscript division of the Library of Congress; but neither bill is with the message, nor does the message suggest that either bill was ever returned to the House in which it originated. The President's

right to pocket these bills was unchallenged. In the case of the one relating to preemption rights of settlers on public lands, a new bill was introduced. (Cong. Globe, vol. 12, pp. 54, 233, 320, 368, 370, 396.) In the case of the bill relating to the taking of the testimony in cases of contested elections, the President had said:

"As the Bill has failed under the provisions of the Constitution to become a Law, I abstain from expressing any opinions upon its several provisions. * * *"

A new bill was introduced January 5, 1843. (Cong. Globe, vol. 12, p. 121.) On February 24, it was considered in the House. Ibid., p. 344.)

"Mr. Halsted moved to amend the bill so as to make it precisely like the bill passed at the last session, and the amendment was agreed to.

"The bill was then ordered to be engrossed under the operation of the previous question, and it was read a third time; and the question recurred on its passage, on which Mr. Fillmore moved the previous question.

"Mr. Weller called for the yeas and nays on the passage of the bill, which he said had been hurried through in such profound silence, that they scarcely knew what it was. [Loud cries of 'Oh, it's the bill which Captain Tyler pocketed at the close of the last session'; and countercries of 'Well, as there are not ten days of the session remaining, he may pocket it again.']

"The yeas and nays being taken, resulted—yeas 105, nays 82."

The bill was reported to the Senate without amendment on February 28 (Ibid. 363) but it does not appear to have reached a vote in the Senate.

On the last day of the first session of the 35th Congress President Buchanan pocketed a joint resolution in regard to the carrying of the mails. In the following January, in the next session, he sent a message to the House of Representatives setting forth his reasons for doing so. The message is printed in the journal of the House; but it is not printed in the Congressional Globe, nor does it appear to have been discussed in Congress. It will be noted that the message was not sent to the House within ten days from the reassembling of Congress.

On the last day of the second session of the 35th Congress President Buchanan pocketed a bill making an appropriation for deepening the channel over the Saint Clair flats. In the first session of the 36th Congress, in February, he sent to the Senate a message setting forth his reasons for doing so. It is printed in the Senate Journal and in the Congressional Globe for February 2, 1860. It does not appear to have been discussed in Congress. It contains the following paragraph which, in view of the broad language used, is material to the case now before the Court, even though it relates to a bill passed by a previous Congress:

"It is scarcely necessary to observe that during the closing hours of a Session it is impossible for the President on the instant to examine into the merits or demerits of an important Bill, involving as this does grave questions both of expediency and of Constitutional power, with that care and deliberation demanded by his public duty as well as by the best interests of the country. For this reason the Constitution has in all cases allowed him ten days for deliberation; because, if a Bill be presented to

him within the last ten days of the Session, he is not required to return it, either with an approval or a veto; but may retain it, 'in which case it shall not be a law.' Whilst an occasion can rarely occur when so long a period as ten days would be required to enable the President to decide whether he should approve or veto a Bill; yet, to deny him even two days on important questions before the adjournment of each session for this purpose, as recommended by a former annual message, would not only be unjust to him, but a violation of the spirit of the Constitution. To require him to approve a Bill when it is impossible he could examine into its merits, would be to deprive him of the exercise of his Constitutional discretion and convert him into a mere register of the decrees of Congress. I therefore deem it a sufficient reason for having retained the Bill in question that it was not presented to me until the last day of the session. * * *"

In January, 1865, President Lincoln sent to the House of Representatives a message saying that he had not signed a joint resolution of the previous session. His power to pocket this resolution does not appear to have been challenged.

A bill to regulate the elective franchise in the District of Columbia passed the Senate on December 13, 1866 (Cong. Globe, 39th Cong., 2d sess., pt. 1, p. 109), and the House on December 14 (p. 138). On December 20 both Houses adjourned to Thursday, January 3, 1867 (pp. 224, 237). The bill was not presented to the President for approval until December 26, twelve days after it had passed both Houses, six days after Congress adjourned, and less than ten days, Sundays excepted, before Congress reconvened.

On January 7 a message from President Johnson reciting these dates and vetoing the bill was placed before the Senate, the House in which the bill originated (p. 303). The bill was passed over the veto by the Senate on January 7 and by the House on January 8. As the time allowed to the President for consideration of a bill is counted from the time it is presented to him and not from the time it passed Congress, it seems probable that the representatives of Congress delayed the presentation of this bill to the President for twelve days so that he would not have ten days (Sundays excepted) before the reassembling of Congress in which he might pocket the bill.

On March 30, 1867, both Houses of Congress "adjourned" to the first Wednesday in June. (Cong. Globe, 40th Cong., 1st sess., 438, 441, 454, 458, 463.) A bill was presented to President Johnson two days after adjournment. He refused to sign it upon the ground that he could not do so after Congress had adjourned. On July 8 the Speaker ruled that the House of Representatives had not adjourned but had taken a recess. (Globe, p. 512.) The House adopted a resolution that the bill be reenrolled, signed by the two Houses of Congress and presented to the President (pp. 510, 512). In the Senate the resolution was declared out of order under a Senate rule that no general legislation should be taken up during the session (pp. 606, 609). Senator Trumbull made the following remarks which appear to answer the position taken by the Speaker of the House (p. 608):

"Now, it is a law if we have been in session all the time, because it was presented to the President and he did not return it. If we were not in session,

and by our adjournment prevented its return, then it is not a law. These are the words of the Constitution. Now, sir, it can not be supposed that the President could have held all the bills of the last session for three months. During the intermediate time, from March to July, we were in session or we were not in session. Which were we? If we were in session, it is a law—he did not return it; if we were not in session, it is not a law. * * *

"If a bill was presented to him and he thought proper to sign it, that made it a law, whether there was an adjournment or a recess. You can not adjourn for more than three days at a time except by a concurrent resolution, and then it amounts to an adjournment of Congress."

On July 20, 1867, Congress adjourned until November 21. On that day the President received and pocketed a bill for the securing of equal rights in the District of Columbia. On November 21 (Cong. Globe, 40th Cong., 1st sess., p. 767):

"Mr. Sumner asked, and by unanimous consent obtained, leave to introduce a bill (S. No. 141) for the further security of equal rights in the District of Columbia; which was read twice by its title."

"Mr. SUMNER. This is an exact copy of a bill which passed Congress immediately before its adjournment, and which was signed by the President of the Senate and the Speaker of the House of Representatives, and duly sent to the President, but which was never returned by him. I presume that the bill has fallen; that owing to the adjournment of Congress there were no eleven days of session within which the bill could be returned, and that the bill is now, therefore, in the hands of the President, and it is beyond our reach. Under

these circumstances I introduce the bill again *verbatim* as it passed both Houses; and, if there be no objection, I would submit that the Senate proceed with it now. It has already had, I believe, nearly the unanimous vote of this body on a former occasion—certainly the vote of a very large majority, and it has been enrolled. I suggest, therefore, that the Senate proceed with it to-day, and send it to the other House, and make another endeavor to bring it to a close."

The Senator did not, however, secure unanimous consent for the immediate consideration of the bill and it was not passed at that session.

President Johnson later again pocketed a bill for the same purpose and he pocketed several other bills which had not been presented to him ten days before the adjournment of Congress. The one "for the further security of equal rights in the District of Columbia" was presented to the President on December 11, 1867. On December 20, the two Houses adjourned to January 6, 1868. The Senate having requested the President to inform it as to the disposition of the bill, he sent a message in which, after referring to the dates above set forth, he said:

"Congress, by their adjournment, thus prevented the return of the bill within the time prescribed by the Constitution, and it was therefore left in the precise condition in which that instrument positively declares a bill 'shall not be a law.'"

After some discussion in the Senate on January 24, 1868 (Cong. Globe, 40th Cong., 2d sess., pt. 1, pp. 720, 721), the message was referred to the Judiciary Committee. Senator Edmunds, who moved this reference, cited the *Opinion of the Justices*, 45 N.

H. 607, in opposition to the position taken by the President, and Senator Buckalew supported the President's position by reference to executive and congressional precedents. Senator Sumner said (Cong. Globe, as above, p. 721):

"I merely wish to suggest that the term 'adjournment,' which is the subject of comment now, in the place where it occurs in the Constitution, should be interpreted to be an adjournment *sine die;* that is, such an adjournment as brings an existing session of Congress to a complete close. If we give to it that interpretation then of course the action of the President is inappropriate. But I do not wish certainly to dogmatize on a question of that kind * * *."

On February 17, 1868, Senator Edmunds reported from the Judiciary Committee "a bill regulating the presentation of bills to the President and the return of the same." (Globe, pt. 2, p. 1204.) As described in the Globe (p. 1371):

"It provides that the ten days mentioned in section seven of article one of the Constitution, within which the President of the United States is required to return to the House in which it originated any bill not approved by him, shall be held and construed to be ten calendar days (Sundays excepted) next after the day of the presentation of any such bill to him; and the adjournment of Congress, which shall prevent the return of any such bill by the President to that House in which it originated, is to be held and construed to be the final adjournment of a session, and not an adjournment of either or both Houses of Congress, acting by themselves or with the consent of each other, as provided for in the Constitution, to a particular day. And if at

any time within those ten days the President shall desire to return a bill to the House in which it originated, or to send a message to such House that he has signed the same, when such House is not sitting, it is to be lawful for him to return such bill or send such message to the office of the Secretary of the Senate or Clerk of the House of Representatives, as the case may be, and the Secretary or Clerk is to endorse thereon the day on which the return shall be made or the message received, and make entry of the fact of such return or the receipt of such message in his Journal of the proceedings; and such return or sending of such message is to be deemed and taken to be a return of the bill to the House in which it originated, or a sending of the message to that House, to all intents and purposes. Every bill which, having passed both Houses of Congress and having been presented to the President as provided in the Constitution, shall not have been returned by the President with his objections thereto to that House in which it originated within the time herein defined and declared is to be a law. * * *"

Senator Davis said (pp. 1372, 1373, 1405):

"Here is an objection that occurs to me at present to this bill: the Constitution requires that if the President does not approve a bill he shall return it with his objections to the House in which it originated; this bill provides a different mode of disposing of that bill in case Congress has temporarily taken a recess or an adjournment. It dispenses with the requisition of the Constitution that the bill shall be returned to the House, and directs that it be returned to the officer of the House, if the

body is not then in session. I do not believe it is competent for Congress to make any such change as that. I believe that the Constitution is mandatory in that respect; that the bill, where the President vetoes a bill, must be returned to the House, and not to the officers of the House. Of course, if he is to return the bill to the House, the House must be in session, because it is not a House unless in session in the sense in which the Constitution requires the bill to be returned to the House by the President with his objections. * * *

"I think it is the duty of the President, in the plain language of the Constitution, to return the bill, not to the Secretary or Clerk of either House, but to the House itself. That is the unambiguous and plain language of the Constitution. Then the question is, what is returning the bill to the House? It is returning it to the Senate or the House of Representatives in session, because when it is returned it is to be at once considered again. The Constitution contemplates that simultaneously with the return of the bill to the House in which it originated the House may take up the matter for consideration. But, sir, I think there can not be any doubt whatever as to the effect of the language. The language is, that the bill shall be returned to the House in which it originated. I take the position that to return the bill to the Clerk of the House of Representatives, if it originated there, or to the Secretary of the Senate, if it originated in the Senate, when those bodies are not in session, is not a return of the bill to the House in which it originated. * * *

"Suppose the Constitution or the law requires the President to communicate to the two Houses or

either of the Houses in the performance of that duty, when both Houses or the particular House to which he is directed to make communication be not in session, is he authorized to communicate to the Secretary or to the Clerk of that House? I conceive not. It is the duty and the right of the President to communicate to the House and not to a ministerial officer of the House. To enable him to communicate to the House it must necessarily be in session, because he can not communicate with either House when it is in any other situation than in actual session. It must be assembled and in actual session. * * *"

Senator Bayard said (p. 1941):

"The construction given by the committee is, in my judgment, erroneous in two respects. In the first place, the committee confine the term 'adjournment,' as used in the Constitution, to a particular meaning not justified by its received signification at the time of the passage of the Constitution and now, or by its etymology. An adjournment may be defined to be, I will not say a suspension of business, but a postponement of session for a period of one day, from one day to another, or for any number of days. That is an adjournment. It may be from day to day; it may be without day; it may be for a period of ten days or three months. Each is equally included under the word 'adjournment.' The committee, however, proposed to confine the meaning of the word 'adjournment,' as used in this clause of the Constitution to adjournment without day. The Constitution uses no such language. It is necessary to add to the general term 'adjournment' there used the words 'without day,' or '*sine die*,' in order to justify the construction for which the committee contend.

"But, Mr. President, there is an additional objection which to my mind is all powerful. The committee propose in the same section, not intending to deprive the Executive of the ten days to which he is entitled, that if Congress is not in session during the ten days or at the end of the ten days the President may send the bill to the office of the Secretary of the Senate or the Clerk of the House of Representatives, according to the House in which the bill may have originated. There is no such provision in the Constitution; and the settled usage of this Government, without a single exception from its foundation, is that no communication is made by the Executive to either House except to the House in session, and that usage ought to have a controlling influence to exclude the idea which is contained in the provision of the bill that I am now referring to. * * *

"If you are in session on the last day of the time, it is immaterial that you may have adjourned in the interim, because that does not prevent the return of the bill. He is to return it within the time, not on any particular day. You can not abridge the time by a construction of the Constitution. You are not bound to be in session in the interim. If on the day on which the limitation expires the House in which the bill originated is in session, beyond all question a return then would be within the terms of the Constitution and would give to the President the full time to which he is entitled. There is no obligation on him and no reason why he should return the bill on any particular day within the ten days; but he is entitled to the whole time; and if Congress, by its adjournment, does not deprive him of any portion of that time, of course in that case Congress by its adjournment has not prevented the return of the bill with his objections.

"I hold, therefore, that the true construction of the Constitution is plain. The intent of the Constitution is immediate procedure. I do not say that the House may not, when the message comes before them, postpone its consideration to a subsequent day but they have the right to act at once. The intent of the Constitution is that they may, if they see fit, reconsider that measure with the President's objections after the period of ten days has expired. But under the construction this bill gives a bill might be returned when Congress had adjourned for three weeks to the office of the Secretary of the Senate, or even after Congress had adjourned for the session. It is true the bill says the word 'adjournment' is to be construed to mean adjournment for the session. What is there to justify this attempt to add words to the language of the Constitution so as to give to the term 'adjournment' a meaning other than what its etymology and its ordinarily received signification implies? I am unable to understand the reasoning of the committee on that point."

Senator Bayard then discussed the New Hampshire opinion at some length. Two passages from that discussion are especially worth noting (p. 1942):

"There is but one argument used by them which I shall notice. I may say, before referring to it, that one great objection to the weight of the decision would naturally be with every man that it was an unargued case. * * *

"The court, in the course of their argument, rely very much on the usage in that State applied to another matter. The usage in New Hampshire is to send the bill to what is called the executive

chamber. In that case it was sent to the executive chamber, but the Governor did not get it till the day after it was sent there. The court held, under the usage, that the bill had been delivered to him within the intent of their constitution on the day on which it was sent there. Here the usage of the Government of the United States, from its origin to the present day, is, that in no single case has a President of the United States, on the return of a bill to the Senate or House of Representatives, ever undertaken to file his message with the Clerk of the one or the Secretary of the other; but the action of the Executive has uniformly been by message sent to the House when in session. That is the settled usage; and when you look to the language of the Constitution, that the bill is to be returned to the House, it is certainly forcing language to say that a return to the House means filing a paper with the Secretary or Clerk when the House is not in session."

Senator Buckalew said (pt. 3, p. 2076):

"I should like to know how the Secretary can make entries and make up a Journal when the Senate is not in session. I can understand that when the Senate reconvenes the Clerk may hand to the President of the Senate, just as any member might or any outsider might, the particular paper, and it may then be presented to the Senate, and it may be entered in the Journal. But this bill contemplates that our Secretary shall make and keep a Journal when the Senate is not here at all, when there can be no Journal of its proceedings.

"* * * How can you by law charge upon the President, under the Constitution of the United States, the duty of communicating with the Sec-

retary of the Senate or communicating with anyone else except the Senate itself?"

Senator Edmunds, supporting the bill, said (p. 2076):

"The fault in the argument against this bill is in considering that the adjournment of one House to a definite time, either with or without the consent of the other House, as the Constitution may permit or provide, is an adjournment of Congress, the law making and legislative power of the country, a consolidated body in legal contemplation when the concurrent act of the two Houses is requisite to the perfection of a measure. If that be the nature of each House it is still a House and a body, although it does not sit every moment of time, and it has an officer who, for all purposes with which the law may clothe him, represents that body in a mere executive and ministerial point of view. * * *"

"What, then, do we provide? We simply provide that he may communicate with this body while its active operations are in a state of suspense from one day to another, or from one day to two or three days or a week, as the case may be, by filing the paper that the Constitution gives him a right to file within that time with the responsible officer whom the law designates to receive it; and then all that is required of that officer is that he shall enter upon his Journal, which is a book that the rules of the Senate and the Constitution require to be kept—not any daily entry of proceedings, not an ideal thing, but an actual book, the book of record—that he shall enter in that book of record, under the date upon which the bill is returned, the fact that it is returned with the message. Then, when

we meet on the next day, whenever that day may be, when the Journal of the last day's proceedings is read, you find the official entry, the record of the clerk that the law requires him to make, that on such a day this bill, with the accompanying message, was returned. Is there anything irregular or illegal in that when the law has once fixed it? I certainly fail to perceive it."

Senator Buckalew replied (p. 2076):

"Mr. President, the Constitution provides that the Senate shall keep a Journal of its proceedings, of what it does itself. In another clause it is provided that when the President returns a bill with his objections that message thus containing his objections shall be entered upon the Journal of the Senate. The fact of receiving such a message and the entry of that message upon the Journal must, in the very nature of the case, be when the Senate itself is in session."

Senator Hendricks, supporting the bill, said (p. 2077):

"It has come to be the habit of Congress, and of each branch of Congress, to take recesses. Those are clearly not adjournments within the meaning of the Constitution, as I think. Then a case of that sort must be provided for, and I think it is proper that by law we should settle that which is not settled perhaps definitely by the Constitution. Now, I think it is proper for Congress to say explicitly that a recess is not an adjournment; that a recess for a term of days by the two branches is not an adjournment; and especially a recess of either branch for a period less than three days is not an adjournment, and to provide what shall be done with a bill that is returned from the President dur-

ing that time. It is simply a declaration on the part of Congress that it is still in session, and a provision whereby a bill may be returned. In that view, I support the measure."

Senator Morton, opposing the bill, was the last speaker (p. 2078):

"It would be just as good for the private Secretary of the President to retain a bill as for the Secretary of the Senate; just as much a compliance with the provision of the Constitution; and it would be just as satisfactory to my mind for the President to retain it during the odd days as for the Secretary of the Senate to do so.

"It seems to me, Mr. President, that the bill is not founded upon the correct principle in that respect. I agree that it is the final adjournment of Congress, of both Houses, that was intended to defeat a bill. That is the spirit and meaning of the Constitution; and if we start out with that as a key, we shall find that it makes no difference whether the bill be returned on the eleventh or twelfth day, if that be the first day that the Senate or House shall be in session after the ten; but to say that it may be returned to a subordinate officer, to the Secretary or to the President of the Senate, or to the Speaker of the House, and that that shall be a compliance with the Constitution, it does seem to me, in the language of the Senator from Pennsylvania, is absurd.

The bill passed the Senate on March 24, 1868. It was received by the House of Representatives on the same date (Cong. Globe, 40th Cong., 2d sess., p. 2083); was brought up in the House on July 22, and was then referred to the House Committee on

the Judiciary (Globe, pt. 5, pp. 4341, 4342). On July 27 both Houses took a recess until September 21. (Globe, pp. 4501, 4518.) No further action on the bill was taken.

Apparently Senator Edmunds did not hold the same views in 1884 as he expressed in 1868. In an opinion rendered by Attorney General Miller in 1892 is this passage (20 Op. A. G. at 506):

"Hon. George F. Edmunds, President *pro tempore* of the Senate, in a note to President Arthur under date of December 24, 1884, expressing a like opinion says:

"'A bill * * * has passed both Houses of Congress and was presented for my signature after both Houses have adjourned until 5th of January. This is more than ten days, and, if it were now presented to you, you could not return it with your objections. I do not know what the practice has been, but it would seem to me as if the bill could not become a law constitutionally; but if you think it can I will send it to you.'"

The Attorney General added that Senator Edmund's note was probably not carefully considered but that it stated his impression at the time.

No further messages were sent by any of the Presidents to either House of Congress concerning pocketed bills. Bills, however, were pocketed. Many such bills are cited in House Document No. 493. One of these was pocketed by President Harrison in December, 1892, after receiving an opinion from Attorney General Miller (20 Op. A. G. 503) in which he quoted from a memorandum communicated by Attorney General Devens to President Hayes saying:

"All these provisions indicate that in order to enable the President to return a bill the Houses should be in session; and if by their own act they see fit to adjourn and deprive him of the opportunity to return the bill, with his objections, and are not present themselves to receive and record these objections and to act thereon, the bill can not become a law unless ten days shall have expired during which the President will have had the opportunity thus to return it. There is no suggestion that he may return it to the Speaker, or Clerk, or any officer of the House; but the return must be made to the House as an organized body."

Attorney General Miller added (20 Op. A. G. at 507):

"Suppose Congress having met on the 1st of December were, on the 1st of February, to adjourn until the 1st of October. What would become of a bill presented to the President and not approved within ten days? It could hardly remain in a state of suspended animation until Congress should reconvene. The President could not veto it in the manner provided by the Constitution; and, this being so, it would appear to follow that if not signed it must fail to become a law."

There does not appear to have been any further discussion in Congress concerning such pocketings until President Cleveland during the Christmas recess of 1896 pocketed two private pension bills. Both bills were reintroduced. S. 3622 was passed and became a law without the President's approval. (Cong. Rec., vol. 29, pt. 3, p. 2024.) S. 3623 was amended to provide a smaller pension and was approved by the President. (Pp. 2023, 2525.) The following extract shows the discussion in the Senate on February 1, 1897 (Cong. Rec., vol. 29, pt. 2, p. 1378):

"Mr. HILL. A bill of which this is an exact copy passed the House of Representatives a long time ago, and it passed the Senate in December last. It was one of the bills which was presented to the President just previous to the holiday recess, which was a recess for a longer period than ten days. The President did not act upon the bill, but it was sent to the office of the Secretary of State as a dead bill, it being claimed that Congress had by its adjournment prevented action, and that therefore the bill had expired. I am inclined to doubt whether a mere recess, such as was then taken, was an adjournment within the meaning of the Constitution which would render the bill a dead bill. The question has never been tested in the courts, as I am advised, and this widow has not the money with which to test it. It is easier, as I think, to have the bill passed over again and sent to the President. I therefore ask that the bill may now have present consideration.

"The VICE PRESIDENT. Is there objection to the request of the Senator from New York?

"Mr. GALLINGER. I think the request of the Senator from New York is a very proper one. The bill reached the President two days before the late recess, and it was held by the President that ten days having elapsed during such recess, it has the same bearing upon a bill as though it were passed upon the final adjournment of a Congress. I agree with the Senator from New York that that is a matter of very great doubt. I think I should take issue with the Executive; but it could only be tested in the courts, and the easiest way is to pass the bill again."

These remarks, which do not appear to have been based upon any careful examination of the subject,

appear to have constituted the last discussion of pocket vetoes in Congress until the Judiciary Committee of the House of Representatives of the 69th Congress, second session, made a report to that House adopting the report of a subcommittee which said (Cong. Rec., vol. 68, pt. 5, p. 4933):

"While this is a question not free from difficulty, it is the opinion of your subcommittee the clear intent of the Constitution is that Congress shall have the opportunity to consider the President's objections, if any; that the adjournment contemplated in the constitutional provision relating to presidential objections to bills and return thereof is the final adjournment of Congress, not an interim adjournment. Therefore your subcommittee is of the belief that the adjournment on July 3, 1926, of the first session of the Sixty-ninth Congress, did not suspend the President's duty with reference to bills presented to him on that day, wherefore H. R. 5218 became a law by the lapse of the constitutional 10 days."

The committee said that an adjournment other than one which terminates the existence of a Congress does not render the return of a bill impossible and suggests that the President might have returned the bill to officers of Congress.

No President has ever acted on the view that he had ten legislative rather than ten consecutive calendar days on which to consider a measure. The Senate Committee did not take that position in 1868. The House Judiciary Committee did not clearly so declare in 1927. Congressional precedents can not be urged in support of such a position.

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 565

THE OKANOGAN, METHOW, SAN POEILS (OR SAN POIL), NESPELEM, COLVILLE AND LAKE INDIAN TRIBES OR BANDS OF THE STATE OF WASHINGTON

vs.

THE UNITED STATES

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

May it please the Court:

The undersigned, a member of the Committee on the Judiciary of the House of Representatives of the United States, pursuant to a resolution of said Committee, respectfully moves this Honorable Court for leave to file the accompanying brief as *amicus curiae* in the above entitled cause.

HATTON W. SUMNERS,
As amicus curiae.

BRIEF OF HATTON W. SUMNERS AS AMICUS CURIAE

PRELIMINARY STATEMENT

Due to the fact that there is involved in the above entitled cause the question of the effect of adjournment of the first session of a Congress upon bills passed by the Congress which had been delivered to the President less than ten days (Sundays excepted) prior to the adjournment of such session, and not acted upon at the time of such adjournment, the determination of the above entitled cause is a matter of the greatest importance and concern to the Congress, and particularly to the House of Representatives, who have had the matter under consideration and have reached the conclusion that such bills have become law. Some Presidents holding a contrary view, conflict of attitude and confusion are inevitable. The question is important to the Congress since upon its determination depends whether such bills expire, necessitating their reintroduction and the expenditure of time and the delay incident to proceeding with them *de novo*. For these reasons it is thought proper that a brief should be presented to this Honorable Court in the above entitled cause by a Member of the House of Representatives.

Article 1, Section 7, Clause 2 of the Constitution of the United States provides in part the following:

> If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

The petitioners contend that the words in the above quoted clause, "by their adjournment prevent its return," refer only to the final adjournment, or to the adjournment of the last session of the Congress, and with this contention the *amicus curiae* agrees.

It is contended for the Government that the words "by their adjournment" refer also to the adjournment of the first or intermediate session of the Congress, and with this contention the *amicus curiae* does not agree.

It is contended for the Government that the words "by their adjournment prevent its return" in the above clause refer in the present case to an adjournment of the first session of the Congress, and in support of this contention Executive precedents have been cited on behalf of the Government which would indicate that they further contend that any interim adjournment within a session of the Congress would be such an adjournment as would prevent the return of a bill by the President to the Congress.

QUESTION STATED

The broad question is whether a bill, which, during the first session of a Congress has regularly passed both Houses of the Congress and has been presented to the President as the Constitution requires, less than ten days before the adjournment of such session, Sundays excepted, and is neither signed by the President, nor returned by him with his objections to the House of its origin within ten days, either legislative days or calendar days (Sundays excepted), becomes a law.

SUMMARY OF ARGUMENT

The construction allowing a pocket veto allows an absolute veto which was not intended by the framers of the Constitution.

The construction allowing a pocket veto allows a silent veto contrary to the express provisions sought to be construed which provides that the reasons for objections to a bill shall be of record.

The construction allowing a pocket veto ignores the fact that a Congress has an uninterrupted existence from its organization until it is ended by the limitations imposed by the Constitution.

The construction allowing a pocket veto denies the Congress the right to act through authorized agents of the Congress, in receiving Executive communications, while according the right to the Executive to send and receive communications to the Congress through agents.

The construction allowing the pocket veto ignores the Constitutional mandate that the President must return a bill with his objections to the House in which its originated if possible to do so, otherwise the bill becomes law.

The exercise of the pocket veto arises from no necessity or expediency in government resulting from an adjournment of the first session of a Congress, or limitation upon the constitutional power of the President incident to that adjournment affecting his ability to carry out the provisions of the Constitution generally applicable to the return to Congress of objections to bills.

ARGUMENT

Provision Under Discussion Analyzed

When resort is had to those provisions of the Constitution which fix the powers and duties out of the exercise of which this question has arisen, it is disclosed that the determination of the main question depends upon whether

it is fixed by the Constitution that the return of a bill with the objections of the President must be made to the House of its origin in actual session, or whether, prior to the final adjournment of a Congress, the return of a bill, in the absence of such House in session may be made constructively, through acceptance by an appropriate agency of that House, and whether the ten days specified in the Constitution are calendar days or legislative days.

Article 1, Section 7 of the Constitution directs that every bill before it becomes a law be presented to the President. If the President approves the bill, he shall sign it. If he does not approve it, he shall formulate his objections, and return the bill, together with his objections to "that House in which it shall have originated." That is the plan.

Then follow two provisions: The first, that if the President does not return the bill with objections within ten days, Sundays excepted, it becomes a law in like manner as if he had signed it; and the second, unless the Congress by their adjournment prevent its return, in which case it shall not be a law. Both of these provisions were clearly intended to safeguard the general plan already set up with regard to legislative enactments, and more particularly Article 1, Section 1 of the Constitution, which provides that: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives". The construction contended for by the Government in the instant case, under which it is insisted that Article 1, Section 7 supports the practice of the pocket veto, puts this provision at variance with every detail of the general legislative plan, and at variance with the general scheme of government embodied in the Constitution.

CONSTRUCTION SUPPORTING POCKET VETO AT VARIANCE WITH GENERAL PLAN OF THE CONSTITUTION

To have the President examine bills and indicate his opinion as to them was deemed important, but not so important as delay beyond the ten days specified in the Constitution as the maximum time allowed for the completion of his duties. So it is provided that if a bill is not returned by the President to the House of origin within ten days, Sundays excepted, after it is presented to him, it becomes a law, the same as if he had signed it. That is a very significant provision in the Constitution as bearing upon the question here under consideration, indicating the importance of avoiding delay.

The language of the Constitution referred to is followed by a single specific qualification, "unless the Congress by their adjournment prevent its return, in which case it shall not be a law." Out of that language the question here under consideration arises. The construction insisted upon by the Government in effect would eliminate the word "prevent" and construe the language in its effect to be "unless the Congress in the meantime adjourns, in which case if not returned it shall not be a law." That construction does not meet the test of any recognized rule. "Prevent" is the heart and substance of that provision. If the Constitution does not limit, as it does not, delivery of a bill with the President's objections to the House of its origin when in actual session the provision of the Constitution under consideration harmonizes with and safeguards, and makes workable in every situation the general plan of the Constitution, leaving to both the President and to the Legislative bodies an opportunity to utilize appropriate and necessary agencies in the discharge of their respective duties

with regard to bills, and to proceed without friction or uncertainty, and with the minimum of interference with the discharge of their general duties. But if the above provision is construed arbitrarily to prevent the delivery of a bill to the House of its origin, except in actual session when Congress is in session, that provision is in direct conflict with the entire general plan governing legislative processes, and with the reciprocal duties of Congress and the President with regard to the acts of Congress.

CONSTRUCTION SUPPORTING POCKET VETO VIOLATES ACCEPTED RULES OF CONSTRUCTION

If the words "unless the Congress by their adjournment prevent its return" in the provision under consideration had not been incorporated, the ordinary rules of construction would probably have excused the President from returning a bill to the House of its origin within the time fixed by the Constitution if prevented from so doing, not only by this act specified, but by any act of the Congress or of that House to which return must be made. These words become therefore under the ordinary rules of construction, not words of addition, but words of limitation, and of exclusion, and make definite that only an act of Congress and what act of Congress would prevent an unreturned bill from becoming law without regard to Presidential approval.

Under the clear wording of the clause quoted mere adjournment of Congress would not of itself be sufficient to prevent an unreturned bill from becoming law. Giving to the words of that clause the meaning which they would ordinarily imply, the Congress must not only adjourn, but their adjournment must be of such a character as makes impossible as a natural consequence the return of the bill

by the President with his objections. That is submitted as the plain meaning and intent of the language. The construction contended for by the Government is not only at variance with the meaning of the language used, but is at variance with the substantive provisions of the Constitution of which this provision is adjective.

If delivery of the bill with the President's objections can only be made to the House of its origin in actual session, when Congress is in session, as is contended in support of the pocket veto, the President is limited where he ought not to be limited, and the Congress is limited where it ought not to be limited, in each instance interfering with the discharge of their constitutional duties under the general plan. To say that Congress by any act other than final adjournment of the Congress may prevent the delivery of a bill, and thereby without a reconsideration make law an act to which the President objects, would be utterly unreasonable. But under the rule of construction invoked to support the pocket veto, if the President's messenger, commissioned to make the return, should arrive after the adjournment of the House in which the bill returned had originated, upon the last of the ten days allowed, the other House being still in session, the bill could not be returned and yet the Congress not being adjourned, the bill would become a law contrary to the general plan. Clearly no such consequence was intended.

If the Senate should happen to be the House of origin, and on the last day in which return could be made the messenger of the President should arrive at the Senate chamber, and find that body in Executive session considering a matter of urgent and vital importance, with its doors closed, as it has a constitutional right to close them until the adjournment of that day's session, the messenger could not make the return if it is fixed in the Constitution that return

can only be made in that case to the Senate in session. In neither of these cases would the Congress be in adjournment, and in the case of the Senate, assuming the House to be in session, neither House would be adjourned. Thus under the rule of construction invoked to support the practice of the pocket veto, which construction would exclude the utilization of an appropriate agency of the Senate to effect the delivery, a situation would develop under which the bill would become a law despite the President's objections and without the reconsideration of the Houses of Congress, notwithstanding the fact that the President had formulated his objections and within the limit of time fixed by the Constitution had attempted to return the bill to the House of its origin. In that case, with the President endeavoring fully to comply with the Constitution with regard to objected to bills, with neither the Congress nor the Senate at fault, the plan provided in the Constitution would fail.

There is another test to which we may submit this proposed rule of construction. Under the construction urged in support of the pocket veto the purely ministerial service of returning a bill to the jurisdiction of Congress cannot be effected except by the interruption and suspension of all other business of the House to which the bill is returned. The claim is that it is thus fixed by the Constitution.

There is another test. If the Congress should not be in session for ten days after the delivery of bills to the President, all those bills would fall under the possibility of what would amount to an absolute veto, even though Congress had adjourned for only eleven days, and notwithstanding the fact that the Constitutional Convention had unanimously decided against the wisdom of permitting the President to have such a power.

CONSTRUCTION OF PROVISION SUPPORTING POCKET VETO VIOLATES THE OBVIOUS PURPOSE AND INTENT OF THE PROVISION UNDER CONSIDERATION

There is no reason obvious or which can be conjured up which might have caused the Constitutional Convention to have imposed with regard to the final act in the interchange of bills between the President and Congress limitations and restrictions imposed nowhere else with regard to such interchange and imposed nowhere else in the whole scheme of government. There is no language in the provision governing this passing of bills between the President and Congress, or any recognized rule of construction which, while permitting the Congress in the first instance to send bills to the President by a messenger, as is done without question, and the President to receive such bills through an appropriate agent even when himself absent from his office; and the President, though he may be away from the Capital, at the time returning the bill by messenger to the Congress, though the Constitution declares "he," the President, shall return it, which would prevent the House of origin from receiving these same bills through a proper agent if that House were engaged in other business or temporarily absent from their Chambers. It is against all reason and every recognized rule of construction, when the avoidance of unnecessary delay is so clearly manifest in the provision sought to be construed, that a construction should be superimposed which would make for delay regardless of every desire and of every effort of the President and of the Congress in the situation indicated. The general plan of the provision sought to be construed, is to afford the Congress the benefit of the President's objec-

tions to an unapproved bill, when the subject matter comes up for a second consideration. It is a legitimate question to ask, why abandon the recognized rules of construction, the rule of construction recognized in every other act of the transfer of bills between the President and the Congress in order to deprive Congress of the certainty of that benefit, and of the opportunity to carry on to completion the work imposed by the Constitution? Or why, after the States, by a unanimous vote, had refused to vest the President with an absolute veto, a construction of this provision should be adopted contrary to its language which would give to the President, under certain circumstances, an absolute veto in effect, when there is a recognized rule of construction recognized alike by the Courts and common sense which would avoid these consequences?

There is no reason why in view of the provision directing the writing and recording of the President's objection to a bill, a construction should be sustained, or can be maintained, adding in effect a provision which would permit the President during the life of a Congress to kill a bill by his silence, by the pocket veto, and thus keep his reasons and his motives for so doing from the Congress and from the country. In a document which is remarkable for its strict economy in the use of words, and in which it is rare to find surplus or unnecessary words of any description, we find set forth with the most exact care a description of the steps necessary to be taken in the event the executive and legislative branches disagree on the advisability of enacting legislation. It is provided that before a bill becomes law it shall be presented to the President for his approval. If the President does not approve of the bill he shall return it to the House of origin with his objections. The House of origin is directed to enter the objec-

~~adjourn for a recess during the last three of the ten days~~

tions on their journal, and proceed to reconsider the bill. Upon that vote the same shall be by yeas and nays and the names of the persons voting for and against the passage of the bill must be entered on the journal of the House. It then provides that the bill, if the House of origin agree to pass it, shall go to the other House, who in turn shall reconsider it. The vote in the other House is likewise by yeas and nays, and the names of those voting for and against the enactment of the bill over the President's objections are entered upon the journal. It is expressly provided that every essential step in this procedure shall be of record, and only where the President fails to make return, only where he is silent, is it provided that a bill shall become law the same as if he had signed it. The construction of this provision, therefore, which gives the President's silence and inaction the power and effect of an absolute veto, is clearly out of harmony and at variance with the expressed terms of the provisions under construction, both in letter and in spirit. Clearly such a result is not necessary during the life of the Congress which originated the bill, or intended by the framers of the Constitution. The sole exception in the provision which prevents a bill from becoming law when the President refuses to take any action on it for ten days, is where the Congress prevents, that is to say renders impossible, its return by their adjournment. There is but one adjournment, the final adjournment, which marks the death and dissolution of a Congress which can have that effect.

There is another viewpoint. This construction insisted upon in support of the pocket veto also hampers unnecessarily the President in the discharge of his constitutional duties. Clearly the framers of the Constitution must have had in mind that the House in which a bill originated might

adjourn for a recess during the last three of the ten days

specified in the Constitution as the limit within which return might be made to it by the President.

Article V, Section 1, last paragraph, of the Constitution provides: "Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days * * *."

In such a situation what is to occur? Is the bill to become a law despite the objections of the President? The Congress has not adjourned, and yet the President cannot make return of the bill to the House of its origin in session because it is not in session. Is the bill to die with the Congress in existence, possibly the House of origin only having adjourned earlier than usual on the last day permitted for the return of the bill? Is there no rational construction of the Constitution possible which will make effective all the safeguards with regard to legislation established in the Constitution, and yet make operative under every circumstance, the general plan set up by the Constitution? Did the framers of the Constitution fix it so that there is nothing that can be done to avoid during the life of a Congress the delay which they so clearly sought to avoid in the physical exchange of bills between the President and the Congress and in the completion of legislative processes? Did they fix it so that there is nothing which can be done to give to the Congress, when it comes to a reconsideration of a measure the benefit of the President's reasons for nonapproval, a thing which the Constitution so clearly intended.

That construction insisted upon by the Government in its support of the pocket veto answers all these questions in the negative; nothing can be done about it, it is said. That construction is challenged, as unsound and its application in its effect as being contrary to the interest of the government; and contrary to the specific language of the Constitution under consideration, and contrary to all recognized rules of construction.

CONSTRUCTION OF PROVISION SUPPORTING THE POCKET VETO IS NOT IN HARMONY WITH THE CONSTITUTION

Where choice may be had between two constructions, that construction is to be adopted which is most in harmony with the whole instrument of which the provision under construction is a part. Further, it is the substantive and not the adjective provisions which control. If the construction is adopted that "adjournment" as used in the provision under consideration means that final adjournment at the end of the last session of the Congress, which in fact terminates the Congress, and all unfinished business before them, harmony between that provision, and that of which it is a part is established. The recognition of the right to accept by constructive receipt a bill of which the President may be making return by constructive delivery of course follows.

Under such construction instead of having a constitutional arrangement under which Congress might not only defeat the return of a bill by adjournment for that purpose, but might defeat return by developments natural and possible in the course of ordinary procedure, we would have a procedure whereby no act of Congress short of final adjournment, short of its death and dissolution, could defeat the return, and no act of the President could delay or hamper Congress in the completion of legislative processes, and nothing could interfere with the ordinary uniform operation of the law-making machinery as devised by the Constitution. Such construction puts the provision under discussion not only in helpful accord with the general plan of the Constitution, but in harmony with the mechanical processes of handling legislation as they exist in fact and operate under the general plan.

A final adjournment of the Congress, and only that one, by its nature prevents the return of bills. Such an adjournment terminates and dissolves the Congress, and ends all matters pending before them. The Constitutional Convention recognized that fact and by the provision under consideration made provision for that contingency. That was the sensible, practical, necessary thing to do. It is the thing which it is insisted was done.

Under such a construction, whereby final adjournment is considered as the only adjournment which will prevent the return of a bill, this provision ceases to be arbitrary, inharmonious, pulling in a contrary direction from and putting out of order the general plan and mechanism of the Constitution, and becomes a helpful, rational and workable addition to the Constitution. Such adjournment is the only adjournment which of itself of necessity does prevent such return. Certainly the Constitutional Convention did not intend a construction which would result in an unnecessary hindrance and confusion to agencies of Government in the discharge of duties assigned.

It seems perfectly evident when the language of the provision under discussion is examined, having in mind what it is manifest the Constitution was trying to accomplish, that adjournment of the Congress as related to the discharge of the President's duties was considered only in the light of its unavoidable consequences. It was the act of preventing delivery, of making delivery impossible, and its consequences, to which the Convention gave consideration, and not the act of adjournment *per se*. It was that only, which, by its nature was a proper matter for a Constitutional Convention to consider. That Convention was not engaged in the business of fixing forms of procedure, or of placing upon

future generations details of procedure, which might be suited to the conditions then existing but unsuited at some future time. They were conscious of the fact that they were assembling the greatest Constitution of all ages and they hoped for all time, suitable for the Government of a great territory; they were not writing petty statutes. They did not fix it in the Constitution that for all time, in order for the Congress to receive from the President the most insignificant bill to which he had found objections, both Houses must be in Congress assembled, and at least the House of the bill's origin in formal session. They did not fix it for all time that in order for the ministerial act of the return of a bill to be effected the business of the House of the bill's origin must be interrupted, however important and pressing the business which then engaged their consideration, while the President's messenger is received and delivers the bill: the same bill which when it was sent to the President had been entrusted by the Congress to a messenger to send to the President, and which had been entrusted by the President to a messenger to carry back to Congress. The genius of the men who composed the Constitutional Convention did not desert them when they came to frame this provision.

THE POCKET VETO CLAIMED AS A PRESIDENTIAL POWER

The construction insisted upon as sustaining the claim of right and power, vested in the President to kill a bill by the pocket veto, introduces another anomaly into our system, not in harmony even with the provision sought to be construed. Such construction unnecessarily gives to the President a greater power

during the life of a Congress over bills presented to him near the end of a session of Congress, or near temporary adjournment during a session, than at other times possessed.

Looking at the plan established by the Constitution, when the Congress has delivered to the President a bill which has passed both Houses, and the President has had ten days, legislative or calendar as construction may determine, to examine the bill and evidence his approval or disapproval of the same in the manner fixed in the Constitution, that is the end of his responsibility. There may be those who question the wisdom of that arrangement, but the framers of the Constitution did not question it. When the President has made up his mind to object to a bill, it then becomes his clear duty to rid himself of its possession by getting it back into the possession of the House of its origin for reconsideration. The right of possession by the President of bills being temporary, and given for a definite, specific purpose, any unnecessary retention of them is not in harmony with the intent and purpose of the Constitution. If the unnecessary detention of the bill be made deliberately for the purpose of denying to the Congress an opportunity to pass the bill, notwithstanding the President's objections, it is an abuse of the discretion with which the Constitution has entrusted him, amounting to usurpation of power. (See Appendix B.)

There is another matter worthy of consideration; if such a practice should become fixed, it will inevitably operate against that accord, mutual respect, and cooperation in service essential for the proper functioning of two departments of the government which must work together. This alone would have been sufficient consideration to have pre-

vented the incorporation of language in the Constitution which would support the development and practice of the pocket veto.

THE POCKET VETO ADVERSE TO THE BROADER PUBLIC INTEREST

This is not a matter of controversy merely between the legislative branches of the government and the President. They are agents of the Government, their common principal, for which principal they jointly have duties to perform.

Under a rule everywhere recognized, where two agencies of a common principal are assigned to different parts of a single undertaking, and the one to whom a part of the work falls, knowing that the undertaking may fail because of lack of time of the other agent to finish his work unless he proceed with expedition, is bound by duty so to proceed. Unnecessary delay, unnecessary detention from the other agent who must finish the work, is not in accord with efficiency. In this direction the pocket veto offends against the public interest.

POCKET VETO GIVES PRESIDENT RIGHT ABSOLUTELY TO VETO DURING LIFE OF CONGRESS

The construction contended for by the Government supporting the pocket veto would make it possible for the delay and silence of the President to be more powerful in its effect upon legislation than his most energetic

effort or forceful statement of reasons for disapproval of a bill returned by him to Congress, and that during the life of the Congress from which he had received the bill. Such a thing was never intended by the Constitution. The Constitution does recognize that the final adjournment of a Congress works a natural, unavoidable limitation upon the power to return bills to a Congress. That is all it does. That is all it could do without marring the symmetry of the Constitution. When the Congress ends nothing further can be done about returning bills. They cannot be returned and ought not to become law without further action. The Constitution, in the provision under consideration makes that clear. That is the only construction permitted by the language of the Constitution and the general plan for legislative enactments which it established.

That is a very different result from that which is claimed with reference to the pocket veto. The framers of the Constitution were not unmindful or negligent of the fact that it is not in keeping with the public interest that any individual, however high his station, should have the sole power by action or inaction to kill important legislation and hide his reasons therefor under a blanket of secrecy. Every reasonable construction should be invoked to minimize such a possibility. Nothing is more calculated to prevent unwarranted suspicion, and to promote efficiency and integrity in official conduct than publicity given to the reasons for official action. The framers of the Constitution could not have been unmindful of the fact that many of the greatest struggles in the history of free government have been to attain this end. Courts are now open, and their opinions are printed, either through the medium of their reports, or in the public

press. The sessions of legislative bodies are open, and their proceedings are printed.

The framers of the Constitution were too well informed as to the dangers of secret determinative proceedings with regard to important governmental matters not to have gone to the limit to protect the person, the office and the people against the inevitable consequences sooner or later to arise from the possibility of such a practice. Even with the conditional, or qualified veto authorized by the Constitution, which gives only the power to suspend, and to send back to Congress for reconsideration, with possibility of reenactment, notwithstanding the President's objections, the President is commanded to put his reasons in writing, and the House to which the return is made is commanded to record those reasons, in their entirety, upon their permanent record books. It was inevitable that unfinished bills at the end of the last session should die with the Congress whose bills they are. But there is no inherent necessity for them to die short of the death of the Congress which originated them. It is not conceivable that the framers of the Constitution incorporated any language susceptible of a construction which would arbitrarily make them die, unfinished, short of the point fixed by unavoidable necessity.

NO INHERENT NECESSITY FOR BILLS TO DIE SHORT OF FINAL ADJOURNMENT.

When the Congress adjourns one day, and reconvenes the next, it begins its work, and all of its agencies and committees begin their work where they left off the preceding day. When Congress adjourns at the end of the

first session they adjourn to a day certain, fixed in the Constitution. When they begin at the beginning of the second session, they begin exactly as if they had adjourned on the calendar day preceding; their committees, and all their agencies begin exactly where they were at the end of the last day of the preceding session. All legislative business before them has exactly the same status at the opening of the second or succeeding sessions as if the adjournment had been on the day preceding.

If, for instance, when the Congress adjourns the first session the House of Representatives should be in that parliamentary situation in which the first legislative business on the next day would have been to take a yea and nay vote upon a given bill, the first legislative business, upon its return for the second session would be to take a yea and nay vote upon that bill. On the first day of the reconvening of a second, or succeeding session it would not be possible to determine from anything observed in the operation of the legislative machinery that a longer period than one intervening night had elapsed since the last legislative day. This is true not only of the legislative business of each House, and their respective agencies, but it is also true as to the Congress as an entity, and as to all of their agencies as a Congress.

The only exception, the only interference, with this procedure arises from the practice indulged in and the right asserted or limitation claimed which has come to be designated as the "pocket veto."

The language of the Constitution does not justify, and every consideration of the general plan, and of the public interest drives judgment away from the conclusion that any power was given to one agency of the government thus to hinder Congress, another agency of the government, their

common principal, in the orderly and usual processes by which their constitutional duties are discharged.

It is a significant fact that it is not unusual now, shortly before or after any adjournment of Congress, or even recess of Congress, for it to be published through the public press that a given bill, known to be disapproved by the President, is being held by him and would become the victim of the pocket veto. That is the present development, stated with no purpose to criticize but to state a fact which is a matter of public knowledge, and by that fact to test the soundness of the construction upon which the claim of that constitutional power depends. In such a case it would not be a failure of legislation by reason of lack of time on the part of the President to make up his mind, but a failure because the President had made up his mind; not a failure because the bill was returned as the Constitution directs and had not received the necessary two-thirds vote to overcome the President's objections, but a failure because the President, with his mind already made up in opposition to the bill, had taken advantage of a situation and for the purpose of depriving Congress of an opportunity to complete the discharge of their constitutional duty had delayed the discharge of his constitutional duty.

It is not meant to impute any conscious neglect of constitutional duty. Exactly to the contrary, and that is the point made. It is a natural development for the pocket veto to come to be exercised as a power to kill legislation, a power of absolute veto, which it is regarded as the duty of the President to exercise upon bills to which he objects. It is such a use as the framers of the Constitution, fully considered, and by action most definite in the Convention, and by the clearest conceivable language in the Constitution, denied to the President.

THE TENDENCY OF THE PRACTICE UNDER THE CLAIM OF POCKET VETO POWER IS TO GIVE THE PRESIDENT AN ABSOLUTE VETO

As a practical matter, public officials as they come to office have transmitted to them not only all rightful power belonging to their office, but also any power which consent or usurpation may have attached to their office. We have gone so far in the direction of absolute veto power in this practice of the pocket veto which has arisen, that any given President would have great difficulty in turning back against the current of the movement. With such claim of power attached to an office there comes much insistence that it be not surrendered, that it be exercised, and there is also a disposition in human nature not to surrender power. It may also be stated without reflection, that any power in government acquired by any method akin to usurpation, using that term here in the sense of gradual accretion, continues to grow and to add danger both to the Government and to the possessor of that power. If the President exercises the power to kill a bill during the life of a Congress which originated it, as distinguished from consequences over which he has no control, that power was not given by the Constitution. The framers of the Constitution could have had no uncertainty as to the inevitable consequences of the exercise of such a power. The fact that it can be exercised only with reference to bills received during the last ten days of a session or presented within ten days of a recess or interim adjournment is immaterial. This character of power vested in a single human being had been responsible for the downfall of too many governments and had been responsible for too much governmental oppression and corruption for the framers of the Constitution not to

have been effectively warned against its non-exclusion from our system of government. When the Constitution was framed, in all the world where enlighted judgment had impressed itself, this sort of power had been excluded. Not since the reign of Queen Anne had the absolute veto power been exercised in England. Today such a power is not to be found in exercise in the Constitution of any of the nations whose culture and governmental institutions are akin to ours. Actual tests have convinced statesmen everywhere that it has no place in the structure of democratic government. There is no difference between a constitutional power to kill a bill by writing "veto" across its face and a constitutional limitation upon the ability of the President to return to Congress a bill to which he objects with the result predetermined and fixed that if not returned it dies. Powers are tested and classified by their effect.

Against the current of world movement in this particular, against the agreed judgment of statesmen everywhere and against the warnings of history we have been moving, until we have reached the point at which the claim is actually made in this case, and in this Court, that a single individual has the power in a given situation to do that which in effect amounts to an absolute veto of an act of the National Legislature, and to hold as a constitutional privilege his reasons and his motives undisclosed, and that, too, with regard to matters of first magnitude.

There is another test bearing upon whether this is a limitation or a power claimed. There is no insistence on the part of those supporting the pocket veto for a broader or a more liberal construction making possible a greater and more diversified opportunity to get an objected-to bill back to Congress in order that they may have an opportunity to reconsider the bill, as is the constitutional plan, and pass

it as the Constitution provides, regardless of the President's objections if that be the legislative judgment. The entire conception of that power is at variance with the Constitution. The tenacity with which it is held, the broadening of the field in which it is used attest the wisdom of the framers of the Constitution, when upon full consideration they unanimously determined to protect the President against its possession and the people against its exercise. Heretofore, with few exceptions, Presidents have used this power with moderattion, but experience has proven that this sort of power entrusted to an individual cannot be held in proper bounds by the maximum of restraint and virtue which human nature may be expected to supply. That is why the Constitutional Convention refused to bestow it.

This claim of the pocket veto power lodged in the President is an entirely different proposition from that of the unavoidable termination of an unfinished bill incident to the expiration of the Congress which had passed the bill. The latter contingency is not out of harmony with the Constitution and with the plan and the philosophy of government established, and with the governmental instincts of the people out of which instincts, necessities and experience that Constitution through many centuries was evolved. The clear trend of constitutional development which the positive declarations of the Constitutional Convention recognized and fixed in our system is that legislative responsibility rests with the legislative branch; that unnecessary delay in legislative processes should be avoided; that an absolute veto power is not vested with the President; that the duty to make public the reasons for his objections to a bill are inseparably associated with the qualified veto power given to the President; and that nothing short of the natural, unavoidable results from the termination of the

Congress shall end their opportunity to complete the discharge of their constitutional duties with regard to a given measure.

The termination of bills unfinished at the end of the Congress is unavoidable. There is nothing in the recognition of that fact out of harmony with the plan of our Constitution. There is nothing in the theory of the pocket veto in harmony with that plan, not one single detail, either as to its conception or its operation.

PRESIDENT'S OBJECTIONS MAY BE RECEIVED BY HOUSE OF ORIGIN THROUGH AN AGENT EVEN THOUGH THAT HOUSE BE NOT SITTING

It is asserted that the President cannot make return of bills to which he is unable to agree, except to the Members of Congress assembled in their respective Houses as a Congress. The Houses of Congress have officers and agents of great power and responsibility who act in their stead, and who are constantly in their places when the Houses are in session, and when they are not in session. From the organization of a Congress until the end of its existence this is true.

There is nothing in the Constitution which denies the right to the use of these agents in effecting the return of objected-to bills. Such a right is acknowledged, and is practiced everywhere in governments, in business and in all human relationships. Chief Justice Marshall in his opinion rendered in McCulloch v. Maryland (4 Wheat. 316, 407, 409, 421) announced the law, which in-

heres in the very nature and necessities of human relationships, the law which neither legislatures, constitutional conventions nor courts can ignore; which is part of every grant of power, and a part of every duty imposed by the Constitution.

This is the language of Chief Justice Marshall:

> "A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the perplexity of a legal code, and could scarcely be embraced within the human mind. * * * The Government which has a right to do an act, and has imposed upon it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means; that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception * * *. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the spirit and letter of the Constitution, are constitutional."

Applying the law as announced by this great jurist which has been the law for all time, and will forever be the law, to the question at issue in the instant case, let us test the position of the Government: "Let the end be legitimate." Certainly returning an objected-to bill to the House of its origin that its legislative processes may be completed is legitimate. "Let it be within the scope of the Constitution." The return of the bill is specifically authorized and commanded by the Constitution. "* * * and all means which are appropriate, which are plainly adapted to that end * * *"

What agency for receipt of the bill could be more "appropriate," or more "plainly adapted to that end," than the Clerk of the House for instance, a high officer of the House of Representatives, elected by its ballot, and in custody of all of its bills from the time of introduction through every stage of development until the end of the jurisdiction of that House, placing upon them as the final act the certificate and seal attesting their authenticity. Such a means is "not prohibited," but is "consistent with the spirit and letter of the Constitution." Such a means Chief Justice Marshall declares is constitutional.

That decision is recognized as sound and applied in practice both by the Houses of Congress and by the President in transactions identical to that with regard to which this question has arisen. It is recognized when the Congress is presenting a bill to the President by an agent. It is recognized by the President when he receives the bill by an agent. It is recognized when the President sends the bill back to Congress by an agent. But that rule is challenged at the precise point at which if followed one step further it would rid the President of jurisdiction over the bill and place it in the custody of the House of its origin so that the legislative plan fixed by the Constitution could be fully consummated. At this point for the first time in the interchange of bills between the President and the Congress the absence of the right to use appropriate agencies is asserted. Testing that which has preceded, by the claim of limitation at this point asserted, the conclusion is inescapable that a rule of construction or of official action which would require in every instance the persons who constitute the Houses of Congress to be in formal session in order to receive bills from the President would also require

the person who is President personally to return such bills. Under such rule, the one urged in support of the pocket veto, the person who is President must himself, assuming the Congress to be in session, take each bill to which he objects and in person make physical delivery to the House of origin, otherwise these bills under the rule of construction supporting the pocket veto become law because not returned by the President as the Constitution requires.

On the other hand the construction which would permit the President to deliver bills together with his objections to the House of origin through an appropriate agent, would of necessity permit the House to which delivery is made to receive such bills and objections through an appropriate agency. The language expressing this equality of right and similarity of duty makes up a subdivision of a single sentence: "Every bill * * * shall, before it becomes a law, be presented to the President of the United States; if he approves he shall sign it, but if not he shall return it, with his objections, to that House in which it shall have originated." It is not conceivable how a rule of construction allowing the use of appropriate agencies can be operative at one end of this subdivision of this sentence, and a rule of construction operative at the other end denying the use of such agencies; or how one rule of construction operates at one end of Pennsylvania Avenue upon the interchange of a bill between the President and the Congress, and another rule of construction operates at the other end of Pennsylvania Avenue in connection with the return of the same bill by the same President to the same Congress.

Under the rule of construction sought to be invoked in support of the pocket veto the Congress would be

required to go in a body to the President, because the command is clearly to the Congress, to present each bill, not to some appropriate agent of the President, but to the President in person. And it becomes the duty of the President, under such construction, regardless of the press of important duties to receive the bill in person. Otherwise, according to this rule of construction the bills would not be presented to the President of the United States.

Up to the very point where the necessities to support the claim of the power of the pocket veto intervene the rule laid down by Chief Justice Marshall is applied by the President in the receipt and return of bills. At that point it is abandoned. This abandonment is necessary in order to support the pocket veto. At this point the Court is being asked to abandon it, and for the first time in our history deny to a department of the Government the right to use an appropriate agency in the discharge of its constitutional duty.

THE CONGRESS HAS AUTHORIZED AGENTS IN CONTEMPLATION OF LAW CAPABLE OF RECEIVING RETURNED BILLS

Insofar as the question under consideration is concerned it may be regarded that the organization of the two Houses of the Congress, and the agencies by them employed, are identical. For the sake of convenience of consideration and economy of time the question of appropriate agencies will be considered as it relates to the House of Representatives.

In the beginning of each Congress the House is organized and equips itself with five officers, who are elected by the House: the Speaker, Clerk, Sergeant at Arms,

Doorkeeper, and Chaplain. The Speaker, Clerk, Sergeant at Arms and Doorkeeper each maintain at all times an office in that part of the Capitol under the control of the House of Representatives, which offices are regularly open each week day from the organization of the House until the end of its existence as fixed by the Constitution, namely, when the tenure of its membership ceases "every second year", as provided in Article 1, Section 2, of the Constitution.

The above named officers of the House of Representatives each perform duties of great importance to the House and to the public interest. Aside from their other duties, which are of the highest order of importance and trust, they constitute the agencies through which the House of Representatives transacts its business and maintains contact with the other departments and agencies of the Government. Most of these services are performed under general delegation of authority, as distinguished from specific direction or commission.

Suppose the President's messenger should arrive at the Capitol to perform for the President the duty of getting an objected to bill back to the House, and should find on that day that the House had adjourned earlier than its accustomed time for adjournment, or had adjourned for three days, as the Constitution permits, or that the Congress had adjourned at the end of its first session, could the messenger question, could the President, or any court or jury or person of intelligence in any station question, in good faith, that the Speaker or the Clerk of the House of Representatives has authority to receive the bill? This is a practical question touching the completion of a purely ministerial act, but one of great importance in the consequences which flow from its completion or non-completion. Can there be any doubt as to how the opinion referred to

of Chief Justice Marshall, which is unquestionably the law, answers that question?

As a matter of fact when the President returns to the House of Representatives during its sessions a bill to which he has objected it is not returned to the House directly. It is sent in an envelope sealed with the seal of the President of the United States, addressed, not to the House of Representatives but to: "THE SPEAKER OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES". It is delivered to the Speaker of the House. Not until he opens the envelope and lays the message before the House do they have any information as to its contents. The delivery of the message to the Speaker by a messenger is all the President does as compliance with the provision of the Constitution that he (The President) shall return the bill to that House in which the same shall have originated.

The receipt by the Speaker is correctly regarded as receipt by the House, but only upon the theory that he is an appropriate agent of the House to receive it. It is in a sealed envelope addressed to the Speaker and delivered to the Speaker. That ends the President's contact with the matter. He has no control over what the Speaker may do with the bill and message. The President's messenger goes back to the White House, leaving the message with the Speaker.

When a Congress has adjourned at the expiration of the first session, the Speaker is just as much the Speaker of the House as when the Congress is in session, just as much trusted, not a single power curtailed. If delivery to the Speaker when Congress is in session is delivery to the House, delivery to the Speaker when the House is in adjournment would be a delivery to the House. The difference in the length of time between the receipt of the

and presentation to the House

President's message in the two cases has no bearing upon the question of the power to receive the message for the House, which is the question involved. What is done with the message after its receipt is neither of the President's responsibility or his concern. That is a matter for the Agent, and his principal. The President is through with the matter. His constitutional duties have been fully and properly performed. It is not contended that the Speaker's authority to receive an objected to bill in behalf of the House is dependent upon this recognition of his authority, but that the return is made to the Speaker for the House because of the obvious fact of his authority and the appropriateness of his agency. How can it be sustained that an adjournment of Congress would prevent a return of a bill to the House through this same agent with the same authority constantly on duty

Near the House Chamber is the office of the Clerk, who is custodian of the bills of the House from the time of their introduction until their final disposition. Upon an adjournment of Congress, Committees, under a rule of the House, deliver all unfinished bills and other documents to the Clerk to be preserved by him for the House until the reconvening of the House. He is the keeper of all the archives of the House. He is entrusted with the enrolling of all bills and other legislative action. He certifies bills. Upon his selection by the House his name is sent to the President so that the President may recognize him as their agent, and give due weight to acts certified by him. The Clerk is the disbursing officer of the contingent fund, salaries of the House employees, and of the Members' Secretaries. He makes up the roll of the incoming House, passing in the first instance upon the regularity of credentials, and pre-

sides over the meeting of the Members of the incoming House before and during the election of a Speaker.

If the President with constitutional warrant and with safety to the public interest can send a bill with his objections by the hand of a messenger, notwithstanding the fact that the Constitution says "he," that is the President, shall return the bill to that House in which it shall have originated, can it be questioned that this high officer of the House from whose office the identical bill was enrolled and certified on behalf of the House is an appropriate agency for the receipt of such returned bill and objections? The problems of government are practical. Common sense has a right to sit in judgment upon this question. Suppose this question should arise in any other relationship where reciprocal duties involve the duty to deliver and the duty to receive? Suppose the agent of the principal whose duty it is to return to the place from which he had gotten it, a thing of which he has had temporary possession, [redacted] upon arrival at the point where the return was to be made should find the other principal temporarily absent but his agents present and particularly the agent present who had formerly had custody for his principal of the identical thing sought to be returned, and who at the moment had custody for his principal of all other things of the same sort as that sought to be returned, whose general duties and relationships with his principal left no doubt as to the confidence and trust reposed in him by his principal, and no doubt in the mind of the returning agent or of his principal that he would be a safe and proper person to entrust for his principal the custody of the thing sought to be returned, can it be held under these circumstances that return is impossible?

To make the analogy complete, what would be the position of the one obligated to make return if he should refuse to deliver to this agent on the premises and go away with the thing he had, knowing if he did so it would immediately die? In a suit for damages could he defend on the ground that he was excused because the temporary absence of the principal made delivery impossible?

When the President's messenger arrives at the Capitol it is still "within the scope of the Constitution" to return the bill. It is still the plain mandate of the Constitution to return it. Either the Clerk of the House or the Speaker afford an appropriate means through which to discharge this constitutional duty, and a means "plainly adapted to that end." By the character of duties performed these officers holding positions of such high trust and responsibility meet every test laid down by Chief Justice Marshall in the opinion hitherto cited.

Should the Senate be the House of origin the same holds true with equal force and effect with regard to the corresponding officers of that body.

THE RIGHT AND DUTY TO USE APPROPRIATE AGENCIES IN THE DELIVERY AND RECEIPT OF OBJECTED TO BILLS IS NECESSARY IN ORDER TO HOLD CONGRESS WITHIN CONSTITUTIONAL BOUNDS

The use of appropriate agencies in the ministerial acts of delivery and receipt of objected-to bills is required by the very nature of the Principals, the character of their duties and the character of the thing to be done. When it is considered that what the Constitution intends is to make certain that the President shall have ten days in which to discharge his constitutional duties, that the

Congress shall have an opportunity to reconsider objected-to bills, and that there shall be no unnecessary delay in legislative processes and that the grounds of the President's objection to bills shall be stated in writing it seems almost unbelievable that the question here presented ever should have arisen.

The right of constructive delivery is necessary not only to facilitate legislative procedure, prevent delay, and to hold the President's powers within the limits imposed by the Constitution, but it is also necessary in order to hold the Congress within proper bounds by preventing bills to which the President may object from becoming law without reconsideration by the Congress.

The adjournment of a House for not more than three days, without the consent of the other House is not an adjournment of Congress.

If the Senate should be in executive session, on a matter of the highest public importance, refusing to be interrupted, on the last day of the period in which return may be made, that would not even be an adjournment of one House of the Congress; and yet return could not be made if constructive delivery is not permitted.

It could not be held that Congress was adjourned when the Senate was in executive session performing its constitutional duty, and the other House in actual session. The sensible thing to do in such a case, would be for the messenger of the President, finding himself unable to make delivery to the Senate, to make the delivery to the Secretary of the Senate. There is nothing in the Constitution to prohibit that being done. If it would be proper under the Constitution for the President's messenger to make such a delivery under the circumstances above outlined, it would be proper to make such

delivery at any other time without regard to whether the House of origin is in session, or both Houses are in adjournment, provided only that the delivery be made to a proper officer of the House of origin during the life of the Congress which enacted the bill returned. That ought to be the practice in every instance. Suppose in the instance considered that the Senate should open its doors to receive the messenger of the President. The business of the Senate would be unnecessarily interrupted while a messenger of the President does a purely ministerial act of returning a bill, possibly authorizing the construction of a bridge across some creek, or raising someone's pension fifteen dollars a month. This actual return to the Senate in session is the only method so it is claimed by the supporters of the pocket veto, permissible under the Constitution. Necessity forces them to this contention, because once it is allowed that return may be made in any situation to an agent of the House of origin, no adjournment, other than the final adjournment of the Congress is sufficient to prevent the return. Their authority is not impaired by the fact that the Congress are not actually in their chambers.

Under the construction which is urged against the practice of the pocket veto it would be possible in the situation just described instead of interrupting the Senate, or if the Senate, or the Congress be adjourned, for the messenger of the President to deliver his papers to the Secretary of the Senate who would call the matter to the attention of the Presiding Officer of the Senate for appropriate action. This course of procedure would eliminate every complication and every question as to the President's having the full ten days in which to discharge his duty with regard to bills; it would eliminate every question as to a bill becoming a law without the completion with re-

gard to it of the usual legislative processes applicable to objected-to bills; it would eliminate every question as to a bill being kept alive until finally acted on. And the Congress would have the usual opportunity in the usual way to consider the President's objections. It would also make it possible to avoid the interruption of the entire business of one House while a message from the President is being delivered. To sustain the pocket veto would make it impossible for all time to avoid the ridiculous interruption of a nation's business, while the President's messenger performs on the floor of the Senate or the House, a purely ministerial act with regard to matters, many of which are of small importance. Neither here nor anywhere else did the Constitutional Convention consider the fixing of such details of procedure, much less permanently fixing them.

POCKET VETO IF SUSTAINED PREVENTS RETURN BY THE PRESIDENT OF HIS OBJECTIONS TO AN EXISTING CONGRESS

Testing this matter from the other direction, suppose the President within the ten days allowed him, had formulated his objections to a bill, and upon the arrival of his messenger at the House of Representatives, he should find the House for some reason adjourned at an earlier hour than was contemplated, and the messenger should deliver the bill with the objections to the Speaker or Clerk of the House, and upon that state of facts the contention should be made that the bill had not been returned.

Having in mind the character of the duties performed by the Speaker and the Clerk, can it be contended with reason, or with any support of law, that in such a situation a delivery

to the Speaker or Clerk had not, in full compliance, ended the constitutional duty of the President to return the bill? If returned to the Clerk, he would have delivered it to the agent of the House, who is the custodian of all bills of the House from their introduction, through every stage of their development. If returned to the Speaker, he would have delivered it to the same agent to whom delivery would have been made had the House been in session. As bearing further upon the question of agency, suitable to the duty to be performed, when the House adjourns at the end of a session the Clerk receives from the various committees of the House all bills and all records, and keeps them in his custody until the Congress reconvenes, and makes proper redistribution of all bills when Congress reconvenes, so that nothing will be confused or overlooked in giving proper consideration in due order to matters which have been left pending during the adjournment.

When that bill left the Congress it was entrusted to an agent of Congress. When it arrived at the White House it was entrusted to an agent of the President. When it was sent back to the Congress it was entrusted to an agent of the President with identically the same character of constitutional direction acting upon it in its entire round-trip journey from the custody of Congress back into the custody of Congress. Certainly that which can be delivered by an agent can be received by an agent.

Under such circumstances a court would certainly hold that not only had the President fully discharged his constitutional duty within proper time, but that he had acted in harmony with the general plan of the Constitution governing legislative processes. That what he had done had prevented unnecessary delay, which the Constitution seeks to avoid; that such action had preserved to the President the full ten days allowed to complete his duties, which the

Constitution is careful to guard and preserve; and had afforded Congress an opportunity to pass the bill, notwithstanding the President's objections, which the Constitution deems important; that the President had afforded Congress and the country the benefit of his objections, which is an important part of the general plan.

POCKET VETO OF GRADUAL DEVELOPMENT AND UNKNOWN IN THE EARLY HISTORY OF THE GOVERNMENT

The pocket veto as now exercised was unknown during the first half of the existence of the Government. The legislative department of the government is as much responsible as the Presidents for our having taken the wrong direction which brought us to our present position. In the sense of responsibility for its origin neither is responsible. Only in a limited and qualified sense did the Philadelphia Convention formulate the Federal Constitution. It had been in process of development for centuries. The very difficulties under which the Convention labored were in no small degree responsible for the excellence of that which was agreed to. The conflicts between the Northern and the Southern States, between the larger and the smaller States, between those who had some faith yet in the people, and those who utterly distrusted the people, between the republican and monarchist sentiments of individual members were much in evidence throughout the Convention. Individuals had novel ideas which they sought to incorporate, but from every excursion seeking new material to be builded into the Constitution, and there were many such, the delegates either returned empty handed, or that which they brought back from the quest, almost without exception, was rejected, in substantial degree at least, because of these conflicts and because it was feared the people would

not exchange for a new theory that which had become a fact of government rooted in their governmental concept, and in accord with their existing governmental institutions. Fortunately, the things that had been tested were the only bases upon which differences could be sufficiently composed to command a majority of votes upon the most important provisions of the Constitution.

In many instances after long debate in which much learning of a human sort was displayed compromise was effected by accepting a provision which had theretofore been incorporated in a State Constitution. The entire provision under consideration in the instant case was taken from the Constitution of the States of Massachusetts and New York, principally from the Constitution of Massachusetts. Thus our Constitution was assembled, made up almost in its entirety of provisions which had been tested, many of them through centuries. Under that test it had been demonstrated that they embody the philosophy of free government and provide the functioning machinery suited for such a government. It is not to be expected that the framers of the Constitution thought through into the details of application.

It was neither the task nor the opportunity of the great statesmen who composed the Constitutional Convention to originate a Constitution. That Constitution was a fact, and those who sat in that Convention were its agents. Their business was to allocate to the embryonic nation and to the States the duties and powers of constitutional government. They did that with great genius. Every necessity, every opportunity, every limitation, every experience, every tradition, which could guide and compel human genius toward the greatest achievement of its sort was present conspiring in complete harmony on that occasion. It was a great event. The Constitution had developed under the most favorable

circumstances. It had been unwritten. Nature had had free course among a people whose governmental instincts had become fixed and whose governmental capacity had reached a high development.

To permit practices, especially practices originating out of a misconception of the Constitution to fasten erroneous interpretations upon our written Constitution, we respectfully submit, would be a fatal policy. It would seem a sound doctrine that no generation or number of generations by a disregard of the plan of the Constitution or confusion as to it, can deprive those who come after them of the full benefit of its provisions. The practical difficulty of inaugurating a reverse practice once it is recognized that a given practice has crystallized itself into a controlling constitutional construction warns with compelling persuasion against such a recognition.

It would seem a sound proposition that in the construction of a written Constitution it should never be held that practice can effect that which practice cannot change. These considerations, it is respectfully urged, bear with determinative force against any suggestion on the part of the Government that the length of time during which the pocket veto has been practiced has a bearing upon the constitutionality of the pocket veto.

Attention is further directed to the fact that the instant case presents a question similar to a boundary question between two States, with regard to which this Court has exclusive jurisdiction. This is a boundary question between two departments of the government, in many respects similar to a boundary conflict between two States. In the determination of a boundary dispute between States no length of acquiescence or practical recognition by either or both States of an erroneous boundary influences the determination of the true boundary. The effect upon land titles and

other private interests are not considered. In the case recently decided by this Court with reference to the Texas-Oklahoma boundary, the Court ascertained the true boundary, leaving private persons and other agencies of government to deal with the consequences incident to a correct discharge of a constitutional duty. While not recognizing its relevancy, it is a fact, as will be shown by an examination of that part of the appendix hereto attached having reference to pocket vetoed bills and from the record in the boundary case referred to, that more private and public interest was disturbed by the determination of the Texas-Oklahoma boundary question than would be disturbed by a holding against the pocket veto. As a rule the bills affected were of small importance. In many instances their subject matter has been covered into subsequent legislation. The operation of laches and limitation, the necessity for appropriation to make effective, and the exercise of the power of repeal, all together, would leave no substantial private right affected or public interest disturbed.

But what is respectfully urged is a judicial construction which will so determine the boundary line between the Congress and the President, with reference to this question that the President in every instance may have the time allowed by the Constitution to examine, approve, or disapprove bills, and return them, and so that the bills of the Congress at the White House at the adjournment of any session short of the final adjournment of a Congress, which may be unfinished because of objection, may be assembled at the Capitol with the other unfinished bills of that Congress and the ordinary procedure fixed by the Constitution had with reference to them upon the reconvening of the Congress. This is the true boundary line fixed by the language of the provision directly under examination and fixed in the general plan established by the Constitution.

In this connection, it is interesting to note a decision of the Massachusetts court, in construing at an early date the word "adjournment" in the provision engrafted in the Federal Constitution, as an example of construction, almost contemporary to the adoption of our Constitution. In the Opinion of the Justices (1791), (3 Mass. 567), upon questions submitted by the Senate of Massachusetts to the Justices of the Supreme Judicial Court, the following among other matters was decided:

> "First, whether a bill or resolve, having passed both branches of the Legislature, and being laid before the Governor for his approbation, less than five days before the recess of the general court next preceding the last Wednesday in May, and five days before the period when the Constitution requires the general court shall be dissolved, but not acted upon by him, has by the Constitution the force of law. If by 'recess' in this question is meant a recess after a prorogation, or recess after an adjournment, where there is no subsequent meeting of the same general court on that adjournment, we are clearly of opinion that such bill or resolve has not the force of law.
>
> "Second. Whether a bill or resolve, having passed both branches of the Legislature, and being laid before the Governor for his approbation, less than five days [the provision was five days in the Massachusetts Constitution] before any recess of the general court, other than such as is stated in the preceding question, and not acted upon by him, has the force of law.
>
> "If the term 'recess,' in the second, is intended a recess upon an adjournment, and such a bill or resolve lays more than five days before the adjournment, and so many days of the court's sitting upon the adjournment, as will make up the full term of five days, without the Governor's returning the same, with his reasons for not approving it, we conceive such bill or resolve has the force of law; for all the days of the

court's sitting are but one session, although an adjournment intervenes. When a prorogation takes place, the session is ended, and a bill or resolve, after the session is ended, cannot acquire the force of law."

It is also of interest and of persuasive effect that each of the decisions, discovered after careful examination, by the courts of last resort of States, construing identical or practically identical language in their respective State Constitutions to that of Article 1, Section 7, under discussion, have held to the same effect as in the Massachusetts determination.

1864 Soldiers Voting Bill, 45 N. H., 607.
1870 Harpending v. Height, 39 Calif., 189.
1875 Corwin v. Comptroller, 6 So. Car., 390.
1881 Miller v. Murford, 11 Nebr., 377.
1882 Wolf v. McCaull, 76 Va., 876.
1886 Heyquembourgh v. Dunkirk 49 Hun. (N. Y.), 550.
1890 Crawford v. Summerset, 73 Md., 105.
1912 State v. Joseph, 175 Ala., 579.
1913 Tuttle v. Boston, 215 Mass., 57.
1916 Johnson City v. Electric Co., 133 Tenn., 637.

In State v. Joseph, cited *supra*, the Court said: "The authorities are unanimous in holding that the adjournment of the Legislature contemplated in the quoted clause of the Constitution is a final adjournment."

BRITISH PRECEDENTS FOLLOWED IN THE BEGINNING

In the beginning the Houses of Congress were without rules and precedents of their own, and adopted the rules of procedure of the British Parliament. Under the operation of the British Parliament upon reconvening after having been prorogued, it was necessary to

begin anew all unfinished business, that business having died with the prorogation.

Following this custom when the Congress reconvened for the second session all bills were reintroduced. Nothing was considered as having survived the adjournment of the first session. There was then little inconvenience from this custom. The territorial limits of the country and more particularly the very limited governmental jurisdiction, then as to subjects, compared with its present jurisdiction, doubtless made this custom of no great legislative or administrative importance. Besides during this period it was the practice of the Presidents when unable to agree to bills passed by the Congress and presented less than ten days before an adjournment (Sundays excepted) to return them to the Congress with a written statement of objections. This continued to be the custom for about seventy years, or until near the period of the war between the States.

In 1816, however, the question as to the fundamental constitutional difference between the Congress and the British Parliament, and the resultant difference of effect upon pending bills of the adjournment of the first session of the Congress and the proroguing of the British Parliament came under consideration. That question was referred to a Committee of the House of Representatives. As a result, in 1818 the practice was established in the House of resuming business unfinished at the adjournment of a preceding session of a Congress at the point where it was left off. This rule, however, did not cover the bills which had gone to the Senate. It was not until 1848 that the present practice was fully established of considering all matters with which Congress and the Houses thereof as separate entities have

to do, as remaining in *statu quo* during the adjournment between sessions of the same Congress.

During the administration of President Johnson the "pocket veto" began to be used as an executive power to defeat legislation. Its use in that manner aroused bitter protest, and became a part of the general controversy between the Congress and the President which reached its climax in the attempted impeachment of the President.

Following the Johnson administration the Presidents have exercised the pocket veto with reference to bills passed by Congress at the first session with very rare exceptions, only upon relatively unimportant measures where the reasons for non-approval were obvious and generally understood.

However, the abolition of the assignment of reasons for non-approval of bills; the growing tendency to use the pocket veto as an additional power over legislation; the increase of the duties of the Congress which makes the retracing of legislative steps necessary to get a bill back to the stage of completion that it had before it was subjected to the pocket veto; a correspondingly increasing need to know in the beginning of the reconsideration of such legislation the ground for Presidential disapproval; and the inevitable strain upon the relationship of the President and Congress occasioned by the practice of the pocket veto, makes this a question of major importance. Associated with this question is another one of almost equal importance; that of preserving the liberty of the co-ordinate branches of the government to develop and to change the agencies through which their respective constitutional duties, such as are properly assignable to agencies, may be performed.

CHANGES IN AGENCIES AND IN PROCEDURE NECESSARY AND PERMITTED UNDER THE CONSTITUTION

As the duties of government increase, the whole tendency is toward the removal of handicaps and the creation of helpful agencies which may safely be entrusted to perform duties which formerly it was feasible for the responsible heads of the departments of the government to perform, thus affording them more time properly to discharge the duties which by their nature and importance cannot be delegated.

The opportunity to preserve, within proper limits, this necessary development is involved in the question here presented. It cannot be accepted that practices, under different conditions, can limit the liberty which the Constitution gives. Erroneous conceptions of the Constitution however long held cannot affect the rights of those who follow in responsibility to discharge their duties as the Constitution itself allows. Contrary to the opinion formerly held by Presidents generally as to their power under the Constitution Presidents now sign bills while the Congress is in adjournment. The former attitude of Presidents was on the theory that approval of a bill was in its nature a legislative function and could only be exercised in conjunction with the active legislative sittings of the Congress from which the bill emanated. That conception is akin to that supporting the pocket veto under which it is even now contended that the President cannot return a bill to Congress unless it is in session, a sort of fossil now which attached itself to our Constitution in times of its ritualistic conception when a Congress then as now, sovereign within the limits fixed by the Constitution, continuous from its organization to final adjournment, was trying to follow

in the footsteps of the British Parliament, an agency of government called into being by the King's will and ending by the King's dismissal.

The authority of Presidents to sign bills after Congress had adjourned was not finally established until the opinion of this Court in the case of La Abra Silver Mining Company vs. U. S. (1899) 175 U. S. 446. In that case the Court held that "the Constitution places the approval and disapproval of bills, as to their becoming laws, upon a different basis," and in consequence the President could sign a bill during a recess of Congress, within the ten-day limitation period. If the President can approve a bill during the adjournment of Congress he can disapprove it, the only question remaining is can he return it to the Congress. Is it physically and legally possible?

But a short distance away is the Clerk of the House in custody of hundreds of incompleted bills of the House every one of them alive awaiting the return of the Congress. An objected-to bill is an incompleted bill of the Congress. The business of the President is finished. The bill naturally belongs with the other unfinished business of the Congress. The plan of the Constitution is to have it gotten back to the Congress where it may be completed. If it can be gotten back with the other unfinished bills while it is still alive and not yet a law it will be alive as a bill when the Congress reconvenes. The Constitution does not fix any method by which the President is to get the bill back. He can return it in person to the Clerk or Speaker, send it by an agent, or if he wants to risk the bill becoming a law because not returned in time, he can send it by mail.

The President cannot keep it in his pocket. With the Clerk willing, ready, and able to receive the bill the

President cannot kill the bill. The Constitution is its protector. He can burn the paper in his possession, but he cannot kill the bill. The President must get the bill back to the House of origin within the ten days allowed or the Constitution makes it a law.

The question as to whether the ten days specified in the Constitution are calendar or legislative days is not very important. If it should be determined that the ten days specified in the Constitution are calendar days, but that delivery can only be made to the House of origin when the Congress is in session, assuming that the Congress has been in adjournment for a sufficient length of time for the total of days adjourned, plus the days of the preceding session after the delivery of a bill objected to, exceeds the ten days allowed for the return of such a bill, the delivery would have to be made on the first day of the reconvened Congress or it would be law. If legislative days are meant, the days of adjournment would have no bearing upon the computation of time allowed, but in neither case does any pocket veto power rest with the President. The Constitution does not read "in which case it shall cease to be" a bill. The statement is that it shall not become a law. That provision merely withdraws such bill from the operation of the previous provision and leaves it in *statu quo*. Nothing has happened to such bill. The President cannot kill it. All legislative power of every sort is vested solely in the Congress, which includes the power to enact, to defeat bills, to amend and to repeal laws. If it should be held that the framers of the Constitution had so bungled at this point as to thrust the prohibitory powers of the Constitution across the President's path, and prevent him from using in the discharge of a constitutional mandate an agency available, to the last degree appropriate, consistent with the letter and spirit of the Constitution and as perfectly adapted

to the end sought to be attained as if provided for that purpose alone, the only effect would be to postpone delivery. Regardless of what may be the conclusion as to the right to make constructive delivery, and regardless of all intervening questions when the ten days shall have expired which marks the end of the longest period of time which under either construction is allowed and the bill has not been returned, it is a law.

PERIOD OF EXERCISE IMMATERIAL

It is immaterial how long the pocket veto has been practiced. Subsequent construction can never alter the text of the Constitution or enlarge or narrow its boundaries. It cannot be allowed that practices which were not burdensome when the business of the government was small, must be perpetuated or that precedents which arose under the misconception now abandoned shall in effect fasten themselves upon the Constitution to remain a perpetual hindrance and limitation upon future generations compelled to deal with ever-increasing responsibilities.

Acquiescence or sufferance for no length of time can legalize a clear usurpation of power or a power exercised under a mistaken conception. Cooley states what seems to be the concensus of judicial opinion thus:

> A claim of power is frequently permitted or yielded to merely because it is claimed, and it may be exercised for a long period in absence of any constitutional right or power, or even in violation of constitutional prohibition without special occasion arising for its interpretation by a court, or anyone being sufficiently interested in the subject to raise the question, but these circumstances cannot be allowed to sanction a clear infraction of the Constitution, or the neglect to discharge constitutional duties or the disregard of the clear right of the Congress. See Cooley's Constitutional Law, pp. 85-86.

It is a matter of the greatest importance and one which justifies faith in the perpetuity of our Constitution that the Courts when called to the decision of a constitutional question deem it their duty to lead back those who have wandered however long or however far and direct them again into the ways of the Constitution. That time will not come short of the end when the reverse will be true; when instead of the Courts by their opinions guiding people and public officials back into the ways of the Constitution, by their opinions they establish barriers which prevent their return. These observations we understand to be in harmony with the decisions of this Court, and are offered in opposition to what seems to have been the position of the Government in the court below.

CONCLUSION

The pocket veto violates the expressed purpose of the Constitution. The Constitution does not give to the President an absolute veto. The pocket veto does give to the President an absolute veto. The Constitution seeks to expedite legislation by the ten-day provision. The pocket veto delays legislation. The Constitution seeks to make the processes of legislation continuous and certain. The pocket veto makes possible the interruption of legislative processes short of their completion during the life of a Congress. The Constitution imposes on the President the duty of returning a bill to which he objects, and secures to the Congress which originates it the benefit of his objections upon the second consideration of the bill. The pocket veto relieves the President of this duty and deprives the Congress of the advantage of the reasons for the President's objections. The Constitution demands that Congress shall enter the President's objections to legislation to which

he objects upon their journal. The pocket veto makes this impossible.. The Constitution requires that the President's objections be made known to the Congress and the country. The pocket veto violates this mandate. The Constitution demands that Congress be afforded opportunity to reconsider, and act upon the President's objections to legislation of which he does not approve, if they see fit to do so. The pocket veto denies them this opportunity. The pocket veto gives to the President a power over legislation denied to the President by the Constitutional Convention.

For these reasons it is submitted that the construction of Article 1, Section 7 of the Constitution permitting the pocket veto of bills prior to final adjournment of the Congress is erroneous.

Respectfully submitted,

HATTON W. SUMNERS,
Amicus Curiae.

APPENDIX A.

A Memorandum of Bills of the Congress "pocket vetoed" or retained by the President at the close of a first or intermediate session of the Congress, or during adjournment falling within such session.

It may be generally stated that through passage of other subsequent legislation on the same subject, laches and non-user, limitations, and non-authorization, and the requirements of subsequent legislation only a few of the bills are of present force, and most of these are subject to further legislative action of the Congress.

Summary of Bills pocket vetoed (Bills unapproved at the end of the final session not included) as shown by the memorandum of the Attorney General's office regarding Bills presented to the President less than ten days before adjournment of Congress (Sundays excepted) and not approved, under date of October 10, 1928, and on December 22, 1928, submitted by the President to the Congress.

There are shown by this memorandum to have been subject to the pocket veto at the end of sessions other than final	129
Of these from Washington, 1789, to the end of Lincoln's administration, 1865, there were	11
From the end of Lincoln's administration to the present	118
Of these bills one President was responsible for nearly half, or	55
Ten Presidents	0

Classification

The bills and resolutions of Congress which the President has not returned may be roughly classified into the following:

Private Relief bills	36
Pension bills	19
Obsolete purposes	10
Relating to District of Columbia	9
Relating to personal status	8
Rights of way over Indian and Government land	8
River and Harbor bills	7
Disposition of war stores and Government property	5
Reduction of National debts	3
General legislation	14
Total	119
Bills returned with objections	10

Chronological—Congress, Session, Date, and Designation of Bill No.

1. 12th Cong. 1st Sess. Adjournment of July 6, 1812.
   H. R. 170. Naturalization bill returned to Congress Nov. 5, 1812, with veto message. House Journ. vol. vii, p. 144.
2. 14th Cong. 1st Sess. Adjournment of April 30, 1816.
   ——Free importation of stereotype plates, etc.
3. 21st Cong. 1st Sess. Adjournment of May 31, 1830.
   H. R. 304. Appropriation for lighthouses and beacons. Returned to Congress Dec. 6, 1830, with veto message. House Journ. 2nd Sess. p. 15.
4. S. 74. Authorizing subscriptions to stock Louisville and Portland Canal. Returned Dec. 6, 1830, with veto message to Congress; Senate Journ., p. 13.

5. 22nd Cong. 1st Sess. Adjournment of July 16, 1832.

S. 5. Interest on State claims. Returned Dec. 6, 1832, with veto message to Congress. Senate Journ. 2nd Sess. p. 19.

6. H. R. 516. River and Harbor bill. Returned Dec. 6, 1832, with veto message to Congress. House Journ. 2nd Sess. p. 24.

7. 23rd Cong. 1st Sess. Adjournment of June 30, 1834.

S. 97. Improvement Wabash river. Returned Dec. 1, 1834, with veto message to Congress. Senate Journ. 2nd Sess. p. 23.

8. 27th Cong. 2nd Sess. Adjournment of August 31, 1842.

H. R. 604. Re proceeds public land sales.

9. H. R. 210. Re testimony on contested elections. Both bills returned Dec. 14, 1842, to Congress with veto message. House Journ. 3rd Sess. p. 57.

10. 35th Cong. 1st Sess. Adjournment of June 14, 1858.

H. R. 57. Overland mail to California. Returned January 7, 1859, to Congress with veto message. House Journ. 2nd Sess. p. 151.

11. 38th Cong. 1st Sess. Adjournment of July 4, 1864.

H. R. 123. For correction of clerical errors. Returned Jan. 5, 1865, with veto message. House Journ. 2nd Sess. p. 80.

12. 39th Cong. 1st Sess. Adjournment of July 28, 1866.

——Joint Resolution regarding buildings of national fair. Withheld from Congress without return or communication.

13. S. 456. For admission of Nebraska. Withheld from Congress without return or communication.

14 40th Cong. 1st Sess. Adjournment of March 13, 1867.

——Res. regarding troops of Missouri. Filed with Secretary of State with reasons for non-approval Apr. 10, 1867. No return to Congress or communication.

15. 40th Cong. 1st Sess. Adjournment of July 20, 1867.

S. 137. Equal rights in Dist. of Columbia. No return or communication to Congress.

16. 40th Cong. 2nd Sess. Adjournment of Dec. 3, 1867.

S. 141. Equal rights in Dist. of Columbia. No return. President subsequently communicated to Congress in response to resolution of enquiry on the bill.

17. 40th Cong. 2nd Sess. Adjournment of July 27, 1868.

—— Act providing for payment of national debt and reduction of interest.

—— Act to provide for appointment of Recorder of Deeds, District of Columbia.

18 40th Cong. 2nd Sess. Adjournment of Dec. 21, 1868.

—— Bill to incorporate First Presbyterian Church of Washington.

19. 41st Cong. 1st Sess. Adjournment of April 9, 1869.

—— Res. for relief of Blanton Duncan.

20. 42nd Cong. 1st Sess. Adjournment of April 20, 1871.

S. 294. Act for relief of inhabitants of town of Arcata, Calif.

21 42nd Cong. 2nd Sess. Adjournment of June 10, 1872.

H. R. 1424. Act to reimburse John E. Woodward for moneys paid by him.

22. H. R. 2622, Act for relief of James De Long.

23. 43rd Cong. 1st Sess. Adjournment of June 23, 1874.
H. R. 921. Act to prevent useless slaughter of buffalo.

24. H. R. 1313. Act for relief of Alexander Burtch.

25. 44th Cong. 1st Sess. Adjournment of August 15, 1876.
S. 990. Act to remove political disability of Ruben Davis of Mississippi.

26. 48th Cong. 1st Sess. Adjournment of July 7, 1884.
S. 42. Act for relief of Joseph F. Wilson.

27. S. 28. Act to confirm status of John H. Quackenbush as Commander, U. S. N.

28. S. 81. Act for relief of Benjamin F. Pope.

29. S. 472, Act for relief of George F. Webster.

30. H. R. 2487. Act for relief of Bvt. Major General William A. Averell.

31. H. R. Joint Res. 17. Authorizing appointment of Samuel Kramer as chaplain, U. S. N.

32. 49th Cong. 1st Sess. Adjournment of August 5, 1886.
H. R. 5872, Act for relief of R. D. Beckley and Lee Howard granting add. pay of $280 per annum.

33. H. R. 658. Appropriating $200 for Francis W. Holdeman.

34. H. R. 822. Appropriating $633.50 for relief of Wm. H. Wheeler for Qm. stores furnished.

35. H. R. 2060. Pension to Margaret D. Marchand.

36. H. R. Res. 126. Directing payment to treasury surplus on public debt.

37. H. R. Res. 89. Providing for distribution of Official Registers.

38. S. 201. For public building in Annapolis.

39. S. 224. Relief of Chas. F. Bowers, and directing credit of $230.00 on his apcs.

40. S. 289. Relief of J. A. Henry et al, for rental of quarters occupied by Qm.

41. S. 972. Relief of Thomas P. Morgan, waiving forfeiture of $4,898.04 on breach of contract.

42. 50th Cong. 1st Sess. Adjournment of Oct. 20, 1888.

S. 664. Relief of William R. Wheaton and Charles W. Chamberlin of California.

43. S. 869. Relief of sufferers of wrecked steamer Tallapoosa.

44. S. 889. Granting pension to Marcy A. Cutts.

45. S. 1614. Granting pension to Phillippe Ray.

46. S. 1926. Granting pension to William Smith.

47. S. 2567. Granting pension to Nancy Polock.

48. S. 3080. Granting pension to Mary J. Foster.

49. S. 3083. Restoring to pension roll Florina Lischewsky.

50. S. 3254. To provide for writs of error to district court of U. S. for western district of Arkansas in certain cases.

51. S. 3241. Pension to Ester A. Jackson.

52. S. 3390. To create Lincoln Land District in Territory of New Mexico.

53. S. 3559. To amend sec. 2304 Rev. Stat. to permit honorably discharged soldiers and sailors who had abandoned homesteads in 6 mo. to make another entry.

54. S. 3573. Granting right of way to Pensacola and Memphis Railway over public lands in Florida, Alabama, Mississippi and Tennessee.

55. H. R. 1239. To extend jurisdiction of Lighthouse Board to Sacramento and San Joaquin rivers in Calif.

56. H. R. 3300. To enable City of Denver to purchase certain land for cemetery use.

57. H. R. 7547. Granting right of way to the Yankton and Missouri River Ry. through Yankton Indian Res. in Dakota.

58. H. R. 7964. Granting Aberdeen, Bismark and Northwestern Ry. right of way through Sioux Reservation in Dakota.

59. H. R. 8074. Providing for allotments of land to United Peorias and Miamies in Indian Territory.
60. H. R. 8674. For relief of Sterling H. Tucket and others.
61. H. R. 8855. To establish light ship, with a steam fog signal at Sandy Hook, New York harbor.
62. H. R. (7) 9447. To restore certain money to fund for erection of building at Detroit.
63. H. R. 10183. To establish light ship at Great Round Shoal near Nantucket, Mass.
64. H. R. 11107. To amend an act entitled "To authorize the Fort Smith, Choctaw Bridge Company to construct a bridge across the Poteau river near Fort Smith, Arkansas."
65. 51st Cong. 1st Sess. Adjournment of October 1, 1890.
S. 117. Relief of Edward H. Lieb.
66. S. 125. Relief of Reany, Son and Archibald.
67. S. 145. Relief legal representatives Henry S. French.
68. S. 968. Relief Larrabee and Allen, Bath, Me.
69. S. 1187. Relief Washington Iron Works.
70. S. 1552. Pension to Louise Seldon.
71. S. 2531. Increased pension to Benjamin T. Baker.
72. S. 270. Relief assignees John Roach, deceased.
73. S. 3414. Pension to James Melvin.
74. S. 3721. Relief A. J. McCreary, Admr. Est. J. M. Heatt.
75. H. R. 4367. Relief of D. H. Mitchell.
76. 51st Cong. 2nd Sess. Adjournment of Dec. 22, 1892.
S. 2275. Relief of purchasers under stone and timber act of June 3, 1878.
77. 53rd Cong. 2nd Sess. Adjournment of August 28, 1894.
S. Res. 99. To compile and publish laws of street railway franchises of District of Columbia.
78. S. 2263. To amend sec. 553 Rev. Stat. relating to District of Columbia.

79. H. R. 198. Granting Birmingham, Sheffield and Tennessee River Ry. right of way over public lands traversed by it.
80. H. R. 3005. Relief of George Isenstein.
81. H. R. 7685. Relief of L. H. Hathaway & Co.
82. H. R. 6122. Authorizing Kansas City, Oklahoma & Pacific Ry. Co. to construct railway through Indian Territory.
83. 54th Cong. 1st Sess. Adjournment of June 11, 1896.
S. Res. 27. Granting permsision to erect monument in honor of Samuel Helmemann.
84. S. 807. Pension to Charles Williamson.
85. S. 819. Pension to Catherine O'Leary.
86. S. 997. Pension to Ella S. Cross.
87. S. 1342. Pension to Lena D. Smith.
88. H. Res. 201. Extending time of payments due from settlers and purchasers on ceded Indian Reservations.
89. H. R. 6607. Relief of Helen Larned.
90. H. R. 6739. Relief of John N. Quackenbush, late Commander, U. S. N.
91. H. R. 7919. For erection and maintenance of charity hospital at Biloxi, Miss.
92. H. R. 7171. Authorizing Secretary of Navy to donate condemned cannon, etc., to certain G. A. R. posts.
93. H. R. 2708. Creating a new division in Eastern Judicial district of Texas, with terms at Beaumont.
94. H. R. 5280. Relief of George W. Freeman.
95. H. R. 6221. Increased pension to Mary E. Chamberlin.
96. H. R. 9275. Approving act of Legislature Territory of New Mexico, authorizing issuance of certain bonds.
97. 54th Cong. 2nd Sess. Adjournment of Dec. —, 1897.
H. R. 2604. Granting increased pension to Caroline A. Haugh.

98. H. R. 4354. Granting increased pension to Mary Gould Carr.

99. 55th Cong. 2nd Sess. Adjournment of July 8, 1898.

S. 847. Providing for American register for steamer Titania.

100. 56th Cong. 1st Sess. Adjournment of June 7, 1898.

S. 2581. To incorporate The National White Cross of America.

101. H. R. 8815. To amend Chap. 4, Title XIII, Rev. Stats.

102. 59th Cong. 1st Sess. Adjournment of June 30, 1906.

S. 1812. Relief of James M. Pickerell, U. S. N. retired.

103. S. 2188. Granting town Durango, Col., land for water reservoir.

104. S. 4197. Authorizing Treasurer to enter name Hezekiah Davis on lists Oregon Volunteers.

105. S. 4774. Relating to movement and anchorage of vessels in Hampton Roads and adjacent waters.

106. S. 4965. Authorizing appointment of Harold L. Jackson, U. S. A., retired, as major on retired list.

107. S. 6355. Concerning licensed officers of vessels.

108. H. R. 7226. Relief of Patrick Conlin.

109. H. R. 12080. Granting Siletz Power & Mfg. Co. a right of way across Indian lands for canal.

110. H. R. 15873. Increased pension to Harley Morley.

111. 61st Cong. 2nd Sess. Adjournment of June 25, 1910.

H. R. 3346. Relief of Frank E. Lyman, Jr.

112. H. R. 18376. Directing that patents issue to certain settlers within the former Siletz Indian Res.

113. H. R. 20644. Relief of Frederick A. Neilson.

114. 62nd Cong. 2nd Sess. Adjournment of August 26, 1912.

S. 2534. To extend time for completion of Alaska Northern Railroad.

115. H. R. 21708. Authorizing the lighting of Piney Branch Road from Georgia Ave. to Butternut St.

116. 64th Cong. 1st Sess. Adjournment of Sept. 8, 1916.

S. 708. To make immediately available for the State of Georgia in payment of expenses of encampment funds appropriated for arming and equipping Georgia militia.

117. 65th Cong. 1st Sess. Adjournment of Oct. 6, 1917.

H. R. 116. For promoting of efficiency, for utilization of resources and industries of the United States, etc.

118. 66th Cong. 2nd Sess. Adjournment of June 5, 1920.

H. Res. 373. Declaring certain acts, joint resolutions, and proclamations to be considered as though the war was ended and the emergency expired.

119. S. Res. 152. Appointing a Commission to confer with the Canadian Provincial Governments in re importing wood pulp.

120. H. R. 13329. Authorizing the Secretary of War to transfer surplus materials to Department of Agriculture.

121. 67th Cong. 2nd Sess. Adjournment of Sept. 22, 1922.

H. R. 10672. Appropriation for Agricultural Department for year ending June 30, 1920.

122. 69th Cong. 1st Sess. Adjournment of July 3, 1926.

S. 3185. Jurisdiction act relief Okanogan et al Indians now before the Court.

123. S. 2999. Providing for parole commission for District of Columbia.

124. H. R. 534. Removing charge of desertion from record of Benjamin I. McHenry.

125. H. R. 6087. To reinstate Joe Burton Coursney in West Point Military Academy.

126. H. R. 5218. To carry into effect Article 12 of treaty with the Shawnee Indians.

127. 70th Cong. 1st Sess. Adjournment of May 29, 1928.
S. Res. 46. Muscle Shoals bill, for dam No. 2 and steam nitrate plant for manufacture and distribution of fertilizers.

128. H. Res. 238. Granting veterans preference in civil service examinations.

129. H. R. 13383. Five-year program construction and maintenance U. S. Bureau of Fisheries.

APPENDIX B.

President Madison's views on the Executive's duty to return bills to the Congress.

"To Henry Clay.

Mad. Mss.
June, 1833.

Dear Sir, Your letter of May 28, was duly received. In it you ask my opinion on the retention of the Land bill by the President.

It is obvious that the Constitution meant to allow the President an adequate time to consider the Bills &c presented to him, and to make his objections to them; and on the other hand that Cong. should have time to consider and overrule the objections. A disregard on either side of what it owes to the other, must be an abuse, for which it would be responsible under the forms of the Constitution. An abuse on the part of the President, with a view sufficiently manifest, in a case of sufficient magnitude to deprive Cong. of the opportunity of overruling objections to their bills, might doubtless be a ground for impeachment. But nothing short of the signature of the President, or a lapse of ten days without a return of his objections, or an overruling of the objections by two-thirds of each House of Cong., can give legal validity to a Bill. In order to qualify (in the French sense of the term) the retention of the Land bill by the President, the first inquiry is, whether a sufficient time was allowed him to decide on its merits; the next whether with a sufficient time to prepare his objections, he unnecessarily put it out of the power of Cong. to decide on them. How far an anticipated passage of the Bill ought to enter into the sufficiency of the time for Executive deliberation, is another point for consideration. A minor one may be whether a silent retention or an assignment to Cong. of the reasons for it, be the mode most suitable, to such occasions. . . ."

(Writings of James Madison, Gaillard Hunt (Vol. ix, p. 515), G. P. Putnam's Sons, New York and London, 1910.)

SUPREME COURT OF THE UNITED STATES.

No. 565.—October Term, 1928.

The Okanogan, Methow, San Poelis (or San Poil), Nespelem, Colville, and Lake Indian Tribes or Bands of the State of Washington, Petitioners, *vs.* The United States.	On Writ of Certiorari to the Court of Claims.

[May 27, 1929.]

Mr. Justice Sanford delivered the opinion of the Court.

This case presents the question whether, under the second clause in Section 7 of Article 1 of the Constitution of the United States, a bill which is passed by both Houses of Congress during the first regular session of a particular Congress and presented to the President less than ten days (Sundays excepted) before the adjournment of that session, but is neither signed by the President nor returned by him to the House in which it originated, becomes a law in like manner as if he had signed it.

At the first session of the 69th Congress Senate Bill No. 3185, entitled "An Act authorizing certain Indian tribes and bands, or any of them, residing in the State of Washington, to present their claims to the Court of Claims," having been passed by both Houses of Congress and duly authenticated, was presented to the President on June 24, 1926. On July 3 the first session of the 69th Congress was adjourned, under a house concurrent resolution.[1] The Congress was not again in session until the commencement of the second session on the first Monday in December.[2] And neither House of Congress was in session on July 6—the tenth day after the bill had been presented to the President (Sundays excepted).

[1] 67 Cong. Rec., pt. 11, pp. 12770, 12885, 13009, 13018, 13100. By the terms of this resolution the House of Representatives adjourned *sine die;* and the Senate adjourned to November 10—this being the date to which, sitting as a court of impeachment, it had previously adjourned for the trial of certain articles of impeachment. 67 Cong. Rec., pt. 8, pp. 8725, 8733. And on that date the Senate, sitting as a court of impeachment, met and adjourned *sine die.* 38 Cong. Rec., pt. 1, pp. 3, 4.

That the adjournment on July 3 was in effect an adjournment of the first session of the Congress is not questioned.

[2] 68 Cong. Rec., pt. 1, p. 7; Constitution, Art. 1, Sec. 4, Cl. 2.

The President neither signed the bill nor returned it to the Senate. And it was not published as a law.

Taking the position that the bill had become a law without the signature of the President, the Okanogan and other Indian tribes residing in the State of Washington in March, 1927, filed a petition in the Court of Claims setting up certain claims in accordance with the terms of the bill. The United States demurred to the petition. The court sustained the demurrer and dismissed the petition, on the ground that under the provisions of the Constitution the bill had not become a law. 66 C. Cls. —.

In view of the public importance of the question presented we granted the petitioners a writ of certiorari. — U. S. —. And for like reason, at the request of the Committee on the Judiciary of the House of Representatives, we granted Mr. Sumners, a member of that Committee, leave to appear as *amicus curiae*. He has aided us by a comprehensive and forcible presentation of arguments against the conclusion of the court below.

The clause of the Constitution here in question reads as follows: "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered; and if approved by two thirds of that House, it shall become a Law. . . . *If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.*"[1]

The specific question here presented is whether, within the meaning of the last sentence—which we have italicized—Congress by the

[1] The third clause reads as follows: "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill."

adjournment on July 3 prevented the President from returning the bill within ten days, Sundays excepted, after it had been presented to him. If the adjournment did not prevent him from returning the bill within the prescribed time, it became a law without his signature; but, if the adjournment prevented him from so doing, it did not become a law. This is unquestioned.

In support of the position that the adjournment did not prevent the President from returning the bill within the prescribed time, counsel for the petitioners and the *amicus curiae* urge that the only "adjournment" which prevents the President from returning a bill within the prescribed time is the final adjournment of the Congress, terminating its legislative existence and making it impossible for the President to return the bill for its reconsideration; and that an adjournment of the first session of the Congress does not prevent the President from returning the bill within the prescribed time since the legislative existence of the Congress is not terminated, and he may within that time return the bill to the House in which it originated, although not then in session, by delivering it, with his objections, to the Secretary, Clerk, or other appropriate agent of that House, to be held by such agent and presented to the House when the Congress resumes its sitting at the next session—thereby enabling the Congress to proceed with the reconsideration of the bill as a part of the unfinished legislative business carried over from the first session. And it is also said, by counsel for the petitioners, that the "ten days" allowed for the return of the bill, may be construed as meaning "legislative days," that is, days on which the Congress is in legislative session, and not calendar days, thereby enabling the President to return the bill within ten days, Sundays excepted, exclusive of all days on which the Congress was not in legislative session, even although, by reason of an adjournment, this period does not expire until after the Congress has resumed its legislative sittings at the second session.

In support of the position that Congress by the adjournment on July 3 prevented the President from returning the bill within the prescribed time, the Attorney General maintains that the word "adjournment" includes an interim adjournment as well as the final adjournment at the end of a Congress; that the words "ten days" mean calendar days, and not legislative days; that the President cannot return a bill with his objections to the House in which it originated except by returning it to the House while in session; that if, by reason of an adjournment taken by Congress within the

prescribed time, the House in which the bill originated be not in session on the last of such days and the bill cannot be thus returned, the President is thereby prevented from returning the bill within the prescribed time; and that this view is supported by the practical construction given to the constitutional provision by the President through a long course of years, in which Congress has acquiesced.

No light is thrown on the meaning of the constitutional provision in the proceedings and debates of the Constitutional Convention; and there has been no decision of this Court dealing directly with its meaning and effect in respect to the precise question here involved. And while we have been cited to various decisions of state courts construing similar provisions in state constitutions, an examination of them discloses such a conflict of opinion—due in some part to differences in phraseology or their application to the procedure of the state legislatures—that, viewed as a whole, they furnish no substantial aid in the determination of the question here presented and a detailed consideration of them here would not be helpful. For that reason we shall cite in this opinion only some that seem most apposite and persuasive in their reasoning.

1. It is earnestly insisted by counsel for the petitioners and by the *amicus curiae*, as the underlying basis of their contentions, that since clause 2 gives the President merely a qualified negative over legislation and requires him, if he disapproves a bill, to return it with his objections to the House in which it originated so that Congress may have an opportunity to reconsider it in the light of such objections and pass it by a two-thirds vote of each House, the provision as to the return of a bill within a specified time is to be construed in a manner that will give effect to the reciprocal rights and duties of the President and of Congress and not enable him to defeat a bill of which he disapproves by a silent and "absolute veto," that is, a so-called "pocket veto", which neither discloses his objections nor gives Congress an opportunity to pass the bill over them. This argument involves a misconception of the reciprocal rights and duties of the President and of Congress and of the situation resulting from an adjournment of Congress which prevents the President from returning a bill with his objections within the specified time. This is illustrated in the use of the term "pocket veto", which does not accurately describe the situation, and is misleading in its implications in that it suggests that the

failure of the bill in such case is necessarily due to the disapproval of the President and the intentional withholding of the bill from reconsideration. The Constitution in giving the President a qualified negative over legislation—commonly called a veto—entrusts him with an authority and imposes upon him an obligation that are of the highest importance, in the execution of which it is made his duty not only to sign bills that he approves in order that they may become law, but to return bills that he disapproves, with his objections, in order that they may be reconsidered by Congress. The faithful and effective exercise of this momentous duty necessarily requires time in which the President may carefully examine and consider a bill and determine, after due deliberation, whether he should approve or disapprove it, and if he disapproves it, formulate his objections for the consideration of Congress. To that end a specified time is given, after the bill has been presented to him, in which he may examine its provisions and either approve it or return it, not approved, for reconsideration. *See La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423, 455.* The power thus conferred upon the President cannot be narrowed or cut down by Congress, nor the time within

*Compare The People v. Bowen, 30 Barb. (N. Y.) 24, 32, 34; Lankford v. County Commrs. of Somerset County, 73 Md. 105, 110, 111; Tuttle v. Boston, 215 Mass. 57, 58, 60; and The People v. Hatch, 33 Ill. 9, 129, 135, 136, in which it was aptly said, in a concurring opinion: "The convention which framed our Constitution designed to provide for the enactment and enforcement of salutary laws in the mode best calculated to promote the general welfare. They supposed, as one of the means of best best attaining this end, that the executive of the State should not only be intrusted with the enforcement of all laws, but should also be vested with a voice in their adoption. In distributing the powers of government, they could, if they had chosen to do so, have authorized the general assembly to adopt laws independent of all executive action. But to prevent the evils of hasty, illy considered legislation, they conferred upon the governor the power to arrest the passage of a bill until his objections could be heard, and the bill be again considered and adopted. As the best means of accomplishing this, and of preventing the adoption of injurious measures, they gave to the governor ten days, exclusive of Sundays, in which to bestow that careful examination and consideration, so essentially necessary to determine the effects and consequences likely to flow from the adoption of a new measure. This is the duty imposed, and it is one that must be performed. And the time allowed for the purpose cannot be abridged, or the provision thwarted, by either accident or design. The use of the whole time given to the governor must be allowed. The Constitution has spoken and it must be obeyed."

which it is to be exercised lessened, directly or indirectly.[5] And it is just as essential a part of the constitutional provisions, guarding against ill-considered and unwise legislation, that the President, on his part, should have the full time allowed him for determining whether he should approve or disapprove a bill, and if disapproved, for adequately formulating the objections that should be considered by Congress, as it is that Congress, on its part, should have an opportunity to re-pass the bill over his objections.

It will frequently happen—especially when many bills are presented to the President near the close of a session, some of which are complicated or deal with questions of great moment—that when Congress adjourns before the time allowed for his consideration and action has expired, he will not have been able to determine whether some of them should be approved or disapproved, or, if disapproved, to formulate adequately the objections which should receive the consideration of Congress. And it is plain that when the adjournment of Congress prevents the return of a bill within the allotted time, the failure of the bill to become a law cannot properly be ascribed to the disapproval of the President—who presumably would have returned it before the adjournment if there had been sufficient time in which to complete his consideration and take such action—but is attributable solely to the action of Congress in adjourning before the time allowed the President for returning the bill had expired. Thus, in *La Abra Silver Mining Co.* v. *United States*, *supra*, 454, this Court said that "if by its action, after the presentation of a bill to the President during the time given him by the Constitution for an examination of its provisions and for approving it by his signature, Congress puts it out of his power to return it, not approved, within that time to the House in which it originated, then the bill falls, and does not become a law."[6]

2. There is plainly no warrant for adopting the suggestion of counsel for the petitioners—which is not urged by the *amicus curiae*—that the phrase "within ten Days (Sundays excepted)", may be construed as meaning, not calendar days, but "legis-

[5]Compare Tuttle v. Boston, *supra*, 60; The People v. Hatch, *supra*, 136.

[6]And if Congress so desires the same bill may be re-introduced and passed when Congress resumes its session, and after receiving the due consideration of the President, if returned with his objections, may be then passed by the requisite vote in both Houses.

lative days", that is, days during which Congress is in legislative session — thereby excluding all calendar days which are not also legislative days from the computation of the period allowed the President for returning a bill. The words used in the Constitution are to be taken in their natural and obvious sense, *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 326, and are to be given the meaning they have in common use unless there are very strong reasons to the contrary. *Tennessee* v. *Whitworth*, 117 U. S. 139, 147. The word "days", when not qualified, means in ordinary and common usage calendar days. This is obviously the meaning in which it is used in the constitutional provision, and is emphasized by the fact that "Sundays" are excepted. There is nothing whatever to justify changing this meaning by inserting the word "legislative" as a qualifying adjective. And no President or Congress has ever suggested that the President has ten "legislative days" in which to consider and return a bill, or proceeded upon that theory.

3. Nor can we agree with the argument that the word "adjournment" as used in the constitutional provision refers only to the final adjournment of the Congress. The word "adjournment" is not qualified by the word "final;" and there is nothing in the context which warrants the insertion of such a limitation. On the contrary, the fact that the word "adjournment" as used in the Constitution is not limited to a final adjournment, is shown by the first clause in section 5 of Article I, which provides that a smaller number than a majority of each House may "adjourn" from day to day, and by the fourth clause of the same Article, which provides that neither House, during the session of Congress, shall, without the consent of the other, "adjourn" for more than three days. And the Standing Rules of the Senate refer specifically to motions to "adjourn to a day certain" (No. XXII); and the Rules of the House of Representatives, to an "adjournment" at the end of one session (No. XXVI).[1]

[1]The view that the "adjournment" contemplated in the constitutional provision is the final adjournment of Congress, and not an interim adjournment, appears to have been expressed in behalf of Congress, for the first and only time, in a report made by the Judiciary Committee of the House of Representatives in 1927 (H. Rep't. No. 2054, 69th Cong., 2d sess.). This was followed by the Chairman of the Committee of the Whole in overruling a point of order made against a provision in an appropriation bill that presented this question; and no appeal was taken from this ruling. 68 Cong. Rec., pt. 5, pp. 4932-4937.

4. We think that under the constitutional provision the determinative question in reference to an "adjournment" is not whether it is a final adjournment of Congress or an interim adjournment, such as an adjournment of the first session, but whether it is one that "prevents" the President from returning the bill to the House in which it originated within the time allowed. It is clear, and, as we understand, is not questioned, that since the President may return a bill at any time within the allotted period, he is prevented from returning it, within the meaning of the constitutional provision, if by reason of the adjournment it is impossible for him to return it to the House in which it originated on the last day of that period. It is also conceded, as we understand, that the President is necessarily prevented from returning a bill by a final adjournment of the Congress, since such adjournment terminates the legislative existence of the Congress and makes it impossible to return the bill to either House. And the crucial question here presented is whether an interim adjournment of Congress at the end of the first session, as the result of which, although the legislative existence of the House in which the bill originated has not been terminated, it is not in session on the last day of the period allowed the President for returning the bill, likewise prevents him from returning it to such House. This brings us to the specific question whether, in order to return the bill to the House in which it originated, within the meaning of the constitutional provision, it is necessary, as the Attorney General insists, that it be returned to the House *itself* while it is in session, or whether, as urged by counsel for the petitioners and by the *amicus curiæ*, it may be returned to the House, although not in session, by delivering it to an officer or agent of the House, to be held by him and delivered to the House when it resumes its sittings at the next session.

Clause 2 specifically provides that if the President does not approve a bill "he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it." That is, it provides in the same phrase and with no change in definition, that the "House" to which the bill is to be returned is that which is to enter the objections on its journal and proceed to reconsider the bill.

From a consideration of the entire clause we think that the "House" to which the bill is to be returned, is the House in

session. In *Missouri Pac. Ry. Co.* v. *Kansas*, 248 U. S. 276, 280, 281, 283, this Court, in holding that the provision in this clause requiring a vote of two-thirds of each House to pass a bill over the President's objections, means two-thirds of a quorum of each House and not two-thirds of all its members, said *arguendo*, that "the context leaves no doubt that the provision was dealing with the two houses as organized and entitled to exert legislative power", that is, the legislative bodies "organized conformably to law for the purpose of enacting legislation"; and, after stating that the identity between this provision and that in Article V of the Constitution, giving "two-thirds of both Houses" the power to submit amendments, makes the practice as to one applicable to the other, quoted with approval the "settled rule . . . clearly and aptly stated" by the Speaker, Mr. Reed, in the House, on the passage of the amendment to the Constitution providing for the election of Senators by the vote of the people, as follows: "What constitutes a House? A quorum of the membership, a majority, one-half and one more. That is all that is necessary to constitute a House to do all the business that comes before the House. Among the business that comes before the House is the reconsideration of a bill which has been vetoed by the President; another is a proposed amendment to the Constitution; and the practice is uniform in both cases that if a quorum of the House is present the House is constituted and two-thirds of those voting are sufficient in order to accomplish the object. . . ."

Since the bill is to be returned to the same "House," and none other, that is to enter the President's objections on its journal* and proceed to reconsider the bill—there being only one and the same reference to such House—it follows, in our opinion, that under the constitutional mandate it is to be returned to the "House" when sitting in an organized capacity for the transaction of business, and having authority to receive the return, enter the President's objections on its journal, and proceed to reconsider the bill; and that no return can be made to the House when it is not in session as a collective body and its members are dispersed. This is the view expressed in 1 Curtis' Constitutional History of the United States, 486, n. 1, in which it is said: "This expression, a 'house', or 'each house,' is several times employed in the Constitution with reference to the faculties and powers of the two cham-

*The journal is the record that each House is required to keep of its own proceedings. Const., Art. I, sec. 5, cl. 3.

bers respectively, and it always means, when so used, the constitutional quorum, assembled for the transaction of business, and capable of transacting business. This same expression was employed by the committee when they provided for the mode in which a bill, once rejected by the president, should be again brought before the legislative bodies. They directed it to be returned '*to that House in which it shall have originated*'—that is to say, to a constitutional quorum, a majority of which passed it in the first instance. . . ."

This accords with the long established practice of both Houses of Congress to receive messages from the President while they are in session. See Senate Standing Rule XXVIII, cl. 1; House Rule XL; 5 Hind's Precedents of the House of Representatives, ch. CXXXVIII, especially sec. 6591, p. 812.

We find no substantial basis for the suggestion that although the House in which the bill originated is not in session the bill may nevertheless be returned, consistently with the constitutional mandate, by delivering it, with the President's objections, to an officer or agent of the House, for subsequent delivery to the House when it resumes its sittings at the next session, with the same force and effect as if the bill had been returned to the House on the day when it was delivered to such officer or agent. Aside from the fact that Congress has never enacted any statute authorizing any officer or agent of either House to receive for it bills returned by the President during its adjournment, and that there is no rule to that effect in either House, the delivery of the bill to such officer or agent, even if authorized by Congress itself, would not comply with the constitutional mandate. The House, not having been in session when the bill was delivered to the officer or agent, could neither have received the bill and objections at that time, nor have entered the objections upon its journal, nor have proceeded to reconsider the bill, as the Constitution requires; and there is nothing in the Constitution which authorizes either House to make a *nunc pro tunc* record of the return of a bill as of a date on which it had not, in fact, been returned. Manifestly it was not intended that, instead of returning the bill to the House itself, as required by the constitutional provision, the President should be authorized to deliver it, during an adjournment of the House, to some individual officer or agent not authorized to make any legislative record of its delivery, who should hold it in his own

hands for days, weeks or perhaps months,—not only leaving open possible questions as to the date on which it had been delivered to him, or whether it had in fact been delivered to him at all, but keeping the bill in the meantime in a state of suspended animation until the House resumes its sittings, with no certain knowledge on the part of the public as to whether it had or had not been seasonably delivered, and necessarily causing delay in its reconsideration which the Constitution evidently intended to avoid. In short, it was plainly the object of the constitutional provision that there should be a timely return of the bill, which should not only be a matter of official record definitely shown by the journal of the House itself, giving public, certain and prompt knowledge as to the status of the bill, but should enable Congress to proceed immediately with its reconsideration; and that the return of the bill should be an actual and public return to the House itself, and not a fictitious return by a delivery of the bill to some individual which could be given a retroactive effect at a later date when the time for the return of the bill to the House had expired.

Thus Attorney General Devens in a memorandum to President Hayes, said: "All these provisions indicate that in order to enable the President to return a bill the Houses should be in session; and if by their own act they see fit to adjourn and deprive him of the opportunity to return the bill, with his objections, and are not present themselves to receive and record these objections and to act thereon, the bill can not become a law unless ten days shall have expired during which the President will have had the opportunity thus to return it. There is no suggestion that he may return it to the Speaker, or Clerk, or any officer of the House; but the return must be made to the House as an organized body."[9]

It is significant that only one attempt has ever been made in Congress to authorize the President to return a bill when the House in which it originated was not in session; and that this failed. In 1868 a bill was reported by the Senate Judiciary Committee for regulating the return of bills by the President.[10] While this specifically declared that the constitutional provision allowed the President ten calendar days (Sundays excepted) in which to return a bill not approved by him, and that the return of a bill would be prevented by "the final adjournment of a session" of Congress, although not by an adjournment to a particular day, it provided that if at any time within such ten days the President desired to return

[9]Quoted in an opinion of Attorney General Miller, 20 Op. 503, 506.
[10]S. 366, 40 Cong., 2d sess.

the bill to the house in which it originated when such house was not sitting, he might return it to the office of the Secretary of the Senate or Clerk of the House of Representatives, as the case might be, who should endorse thereon the day on which such return was made, and make an entry of the fact of such return in his journal of the proceedings, and that such return should be deemed a return of the bill to all intents and purposes. In the debate in the Senate strong opposition was expressed to this feature of the bill on constitutional grounds;[11] and although it passed the Senate by a majority vote, it was never reported from the Judiciary Committee of the House of Representatives, to which it was referred,

[11]In the debate in the Senate the constitutional objections to the provision authorizing the President to return a bill to an officer of the Senate or the House of Representatives when they were not sitting, were clearly and, as we think, convincingly expressed.

Thus Senator Davis said: "(The) Constitution requires that if the President does not approve a bill he shall return it with his objections to the House in which it originated; this bill provides a different mode of disposing of that bill in case Congress has temporarily taken a recess or an adjournment. It dispenses with the requisition of the Constitution that the bill shall be returned to the House, and directs that it be returned to the officer of the House, if the body is not in session. I do not believe it is competent for Congress to make any such change as that. . . . Of course, if (the President) is to return the bill to the House, the House must be in session, because it is not a House unless in session in the sense in which the Constitution requires the bill to be returned to the House by the President with his objections. . . I think it is the duty of the President, in the plain language of the Constitution, to return the bill, not to the Secretary or Clerk of either House, but to the House itself. That is the unambiguous and plain language of the Constitution. . . . It is returning it to the Senate or the House of Representatives in session, because when it is returned it is to be at once considered again. The Constitution contemplates that simultaneously with the return of the bill to the House in which it originated the House may take up the matter for consideration. . . . I take the position that to return the bill to the Clerk of the House of Representatives, if it originated there, or to the Secretary of the Senate, if it originated in the Senate, when those bodies are not in session, is not a return of the bill to the House in which it originated. It is the duty and the right of the President to communicate to the House and not to a ministerial officer of the House. To enable him to communicate to the House it must necessarily be in session, because he can not communicate with either House when it is in any other situation than in actual session. It must be assembled and in actual session. . . I think, sir, that the Executive may not only claim it as a right, but the House in which a bill originates may claim it as the performance of a duty by him to that House, and the people of the country may claim it as the performance of a duty by him, that he shall return the bill with his objections, not, in vacation, to the Clerk or to the Secretary of the Senate or House of Representatives, but

and thus failed to pass the Congress. It does not appear that this suggestion has ever been renewed in Congress.

5. The views which we have expressed as to the construction and effect of the constitutional provision here in question are confirmed

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to the body itself, and to enable him to perform that duty that body must necessarily be in session." Cong. Globe, 40th Cong., 2d. Sess., Pt. 2, pp. 1372, 1374, 1405.

Senator Bayard said: "But, Mr. President, there is an additional objection which to my mind is all powerful. The committee propose . . . that if Congress is not in session during the ten days or at the end of the ten days the President may send the bill to the office of the Secretary of the Senate or the Clerk of the House of Representatives, according to the House in which the bill may have originated. There is no such provision in the Constitution; and the settled usage of this Government, without a single exception from its foundation, is that no communication is made by the Executive to either House except to the House in session, and that usage ought to have a controlling influence to exclude the idea which is contained in the provision of the bill that I am now referring to. . . . But further, the very object of the clause looks to the fact that the bill should be returned during the session of the House in which it originated. It looks, if I may so speak, to immediate action on the part of Congress—at all events it looks to giving to Congress the right of immediate action as soon as the objections of the President are received. The Houses are to proceed to consider the objections; they are to spread them at large on the Journal; there is to be a reconsideration of the measure formerly under debate. The whole clause looks to speedy action, at all events, upon objections made by the President, and the language employed providing for a return to the House does not imply filing a document with the Clerk or the Secretary when the House is not in session, whether it be the Senate or the House of Representatives. . . . Here the usage of the Government of the United States, from its origin to the present day, is, that in no single case has a President of the United States, on the return of a bill to the Senate or House of Representatives, ever undertaken to file his message with the Clerk of the one or the Secretary of the other; but the action of the Executive has uniformly been by message sent to the House when in session. That is the settled usage; and when you look to the language of the Constitution, that the bill is to be returned to the House, it is certainly forcing language to say that a return to the House means filing a paper with the Secretary or Clerk when the House is not in session." Cong. Globe, 40th Cong., 2d Sess., Pt. 2, pp. 1941, 1942.

Senator Buckalew said: "I should like to know how the Secretary can make entries and make up a Journal when the Senate is not in session. I can understand that when the Senate reconvenes the Clerk may hand to the President of the Senate, just as any member might or any outsider might, the particular paper, and it may then be presented to the Senate, and it may be entered in the Journal. But this bill contemplates that our Secretary shall make and keep a Journal when the Senate is not here at all, when there can be no Journal of its proceedings. . . . (The) Constitution provides that the Senate shall keep a Journal of its proceedings, of what it does itself. In

by the practical construction that has been given to it by the Presidents through a long course of years, in which Congress has

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another clause it is provided that when the President returns a bill with his objections that message thus containing his objections shall be entered upon the Journal of the Senate. The fact of receiving such a message and the entry of that message upon the Journal must, in the very nature of the case, be when the Senate itself is in session. . . . The Journal is to be kept by the Senate, and it is to be a Journal of what it does, a Journal of its proceedings. . . . . The reception of a message from the President of the United States is a proceeding by the Senate; it is an act by the Senate itself. . . . I think, therefore, it is manifest that under the Constitution of the United States this Journal and the entries upon the Journal are matters which relate to a session of the Senate, an actual session, the personal presence of the body, and that it is not competent for the Senate to commit to one of its own officers, or to any officer of the Government, or to any citizen, the performance of a duty which is by the Constitution charged upon itself and to be performed by itself. . . . Now, one objection which applies to the bill . . . is that it is against the practice of the Government. From the time that Congress first convened together in 1789 down to this time it has been held, and held uniformly, that if the two Houses of Congress adjourned by a concurrent resolution before the expiration of ten days from the presentation of a bill to the President a bill which should then be left in his hands would fail. . . . They have failed upon repeated occasions, not only during recent years, but far back in former times. . . This bill proposes, in the absence of both Houses of Congress to provide a substitute for the House to which the bill is to be returned. Instead of being returned to the House in which it originated, as the Constitution says, this bill proposes to enact that it shall be returned to the Secretary here alone . . . and that upon the paper . . . being given to that particular person it shall be considered that it has been returned to the House in which it originated. . . . Can anything more flatly contradict common sense, deny the plain fact? Can we constitute our Secretary into the Senate, and can we make the Clerk of the House of Representatives the House for the purpose of doing any official act whatever? You propose that he shall receive the communication from the President as if he were the Senate or the House; that he, sitting anywhere, responsible to nobody, with no check upon him, shall make up a Journal as if he were the Senate or the House for the occasion." (Cong. Rec., 40th Cong., 2d. Sess., Pt. 3, pp. 2076, 2077.

And Senator Morton said: "The Constitution . . . contemplates that the bill shall pass from the custody of the House in which it shall have originated; and we have no power, in my judgment, to say that it shall be sufficient to return it to the President of the Senate or the Speaker of the House or to the Secretary or Clerk. . . . What has become of the bill? The Constitution does not contemplate such a condition of things. . . . It would be just as good for the private Secretary of the President to retain a bill as for the Secretary of the Senate; just as much a compliance with the provision of the Constitution; and it would be just as satisfactory to my mind for the President to retain it during the odd days as for the Secretary of the Senate to do so." Cong. Globe, 40th Cong., 2d Sess., Pt. 3, pp. 2077, 2078.

acquiesced. Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character. Compare *Missouri Pac. Ry. Co.* v. *Kansas, supra,* 284; *Myers* v. *United States,* 272 U. S. 52, 119, 136; and *State* v. *South Norwalk,* 77 Conn. 257, 264, in which the court said that a practice of at least twenty years duration "on the part of the executive department, acquiesced in by the legislative department, while not absolutely binding on the judicial department, is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning."

A memorandum prepared in the office of the Attorney General showing the results of an exhaustive research of governmental archives for the purpose of disclosing the practical construction placed upon the constitutional provision here involved in reference to so-called "pocket vetoes," was transmitted by the President to Congress in December 1928.[12] This memorandum—the accuracy of which is not questioned—cites more than 400 bills and resolutions which were passed by Congress and submitted to the President less than ten days before a final or interim adjournment of Congress, which were not signed by the President nor returned with his disapproval. Of these, 119 were instances in which the adjournment was that at the end of a session of Congress, as distinguished from the final adjournment of the Congress. None of these bills or resolutions were placed upon the statute books or treated as having become a law; nor does it appear that there was any attempt to enforce them in the courts until the present suit was brought. Of these instances 11 occurred before the end of President Lincoln's administration, and the remainder from the end of that administration to the present time. They arose under the administration of all the Presidents except ten. These 119 bills and resolutions are thus classified in the brief of the *amicus curiae:* Private relief bills, 36; pension bills, 19; obsolete purposes, 10; relating to District of Columbia, 9; relating to personal status, 8; right of way over Indian and government land, 8; river and harbor bills, 7; disposition of war stores and government property, 5; reduction of national debts, 3; and general legislation, 14. It does not appear that in any of these instances either House of Congress in any official manner questioned the validity and effect

[12] H. Doc. No. 483, 70 Cong., 2d sess.

of the President's action in not returning the bill after the adjournment of the session, or proceeded on the theory that it had become a law, although neither signed nor returned, until the action was taken in the House Committee of the Whole in 1927 to which we have referred.[15] And in some instances new bills were introduced in place of those that had not been returned. Without analyzing these 119 instances in detail, we think they show that for a long series of years, commencing with President Madison's administration and continuing until the action of the House Committee of the Whole in 1927, all the Presidents who have had occasion to deal with this question have adopted and carried into effect the construction of the constitutional provision that they were prevented from returning the bill to the House in which it originated by the adjournment of the session of Congress; and that this construction has been acquiesced in by both Houses of Congress until 1927.

6. For these reasons we conclude that the adjournment of the first session of the 69th Congress on July 3, 1926, prevented the President, within the meaning of the constitutional provision, from returning Senate Bill No. 3185 within ten days, Sundays excepted, after it had been presented to him, and that it did not become a law.

The judgment of the Court of Claims is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[15]Note 7, *supra.*